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Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States

DAVID RAY HARRIS,
Petitioner

vs.

JANIE COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,
Respondent

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Did the Fifth Circuit properly disregard defense counsel's failure to investigate and present available mitigation evidence, even though (a) the court viewed the omitted evidence in isolation from the circumstances of the crime and from the mitigating evidence that was presented to the jury, and (b) the Fifth Circuit's decision conflicts with the results reached, on closely analogous facts, by many other circuits?

2. At a capital sentencing hearing, can the State constitutionally use, in its efforts to convince the jury to find the aggravating circumstances required as a prerequisite to the death penalty, evidence of a crime for which a prior jury had acquitted the defendant?

3. Can a death sentence be upheld, consistent with *Penry v. Lynaugh*, 492 U.S. 302 (1989), and *Penry v. Johnson*, 532 U.S. 782 (2001), when the jury was precluded from considering the full mitigating impact of undisputed evidence that the victim initiated the exchange of gun fire that resulted in his death and that the defendant did not fire any shots until after himself being wounded in the neck and shoulder?

4. Can a death sentence be upheld, consistent with *Penry v. Lynaugh*, 492 U.S. 302 (1989), when the jury was precluded from considering the full mitigating impact of undisputed evidence that the defendant suffered from severe alcoholism and drug addiction (and that all of the prior criminal activity proffered by the State at the sentencing hearing was committed under the influence of drugs or alcohol)?

LIST OF PARTIES

The Petitioner, David Ray Harris;

The Respondent, Janie Cockrell, Director, Texas Department of Criminal Justice, Institutional Division.

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The decision of the United States Court of Appeals for the Fifth Circuit, reported at 313 F.3d 238 (5th Cir. 2002), is reprinted at Pet. App. A-1 through A-14. The Decision of the United States District Court for the Eastern District of Texas is an unpublished memorandum opinion reprinted at Pet. App. F-1 through F-24. The order of the United States Court of Appeals for the Fifth Circuit, denying rehearing and rehearing *en banc* is reproduced at Pet. App. C.

JURISDICTION

The Court of Appeals' judgment was entered November 18, 2002. Timely petitions for rehearing and rehearing *en banc* were denied on December 16, 2002. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves the provision of the federal habeas statute governing federal review of state court decisions in effect prior to the passage of the Antiterrorism and Effective Death Penalty Act in 1996, 28 U.S.C. § 2254. The text of the statute is reprinted at Pet. App. G.

STATEMENT OF THE CASE

A. Background

During the night of September 1, 1985, David Ray Harris entered the apartment of Mark Mays in Beaumont, Texas. Harris was armed, but he intended only to commit burglary. Harris was unaware that Mays and Roxanne Lockard were asleep in the bedroom. When Harris entered the bedroom, Mays and Lockard were awoken by a light. At that point, Harris instructed Mays to lock himself in the

bathroom. Harris left the apartment with Lockard and, once outside, directed her to get into the passenger side of Harris's pickup truck. Harris then walked around the truck to the driver's side. As Harris was entering his truck, Mays emerged from the apartment with a gun and began firing at Harris. Harris was wounded in the neck and shoulder and, only at that point, returned fire. Several shots were exchanged and, during the exchange, Lockard fled. Mays died from wounds received in the exchange of gun fire – an exchange that Mays had initiated by firing first at Harris. Harris, himself wounded, left the scene alone.

B. The Guilt/Innocence Phase of Harris's Trial

On September 26, 1985, Harris was indicted for the capital murder of Mark Mays. The crime was charged as a capital offense because it was allegedly committed in the course of the kidnapping of Roxanne Lockard. Dennis Powell and Clay Dugas – two young attorneys with scant experience defending capital cases – were retained to defend Harris. They were paid a flat fee to cover their time and all expenses incurred in defending the case.

The case was defended at trial on the theory that Harris was guilty of the lesser-included offense of voluntary manslaughter. Under Texas law, voluntary manslaughter is defined as "caus[ing] the death of an individual under circumstances that would constitute murder except that [the defendant] caused the death under the immediate influence of sudden passion arising from adequate cause." Dugas and Powell premised their voluntary-manslaughter defense of Harris on the theory that Harris did not fire any shots until Harris himself had been shot and wounded in the neck and shoulder by Mays. They thus pinned all of their hopes on convincing the jury that Mays's shooting of Harris

constituted "adequate cause" that gave rise to "sudden passion."

The trial court instructed the jury on the lesser-included offense of voluntary manslaughter. However, the instruction improperly allocated the burden of proof, in violation of *Cobarrubio v. State*, 675 S.W.2d 749 (Tex. Crim. App. 1983). The *Cobarrubio* error existed because the charge failed to require the State to disprove sudden passion. After a 2-day trial (exclusive of jury selection) in April 1986, the jury rejected the manslaughter defense and found Harris guilty of capital murder.

C. The Sentencing Phase of Harris's Trial

The sentencing phase of Harris's trial began on April 28, 1986, and ended the very next day. The State called several witnesses to testify to the circumstances surrounding certain unadjudicated extraneous offenses and prior convictions. The State also offered "pen packets" relating to prior convictions of Harris, as well as the uninformed and entirely speculative opinion of a psychiatrist who had never examined Harris, let alone treated him. The State was also allowed to introduce evidence that Harris had committed a prior kidnapping, even though Harris had been tried for and acquitted by a jury of that alleged kidnapping offense.

Dugas and Powell offered only two witnesses on Harris's behalf at the punishment phase, both of whom were acquainted with Harris only by virtue of Harris's prior criminal activity: Evelyn Nora Powell, Harris's alcohol-abuse counselor, and Nancy Petkovsek, Harris's parole officer. They both provided testimony that Harris was a severe alcoholic and drug addict whose normally shy and introverted personality was dramatically transformed when

he was under the influence of alcohol or drugs.[1] Beyond that, Dugas and Powell failed to offer any of the vast array of additional mitigating evidence (the substance of which is described below) that would have been available to them, had they bothered to conduct an investigation in preparation for the sentencing phase of Harris's trial.

The jury was asked the now-discredited special issues that, in 1986, formed the basis of the Texas death-penalty sentencing scheme: (1) Was the conduct of the defendant that caused the death of the deceased committed deliberately and with the reasonable expectation that the death of the deceased or another would result? (2) Is there a probability that the defendant will commit criminal acts of violence that will constitute a continuing threat to society? (3) Was the conduct of the defendant in killing the deceased unreasonable in response to the provocation, if any, by the deceased?

The jury answered "yes" to all three special issues, and Harris was sentenced to die by lethal injection.

D. Direct Appeal of Harris's Conviction

Powell and Dugas withdrew from Harris's representation after the death sentence was imposed. The state court then appointed counsel to represent Harris in his direct appeal. The Texas Court of Criminal Appeals affirmed Harris's conviction and death sentence, with one justice dissenting. *Harris v. State*, 784 S.W.2d 5 (Tex. Crim. App. 1989), *cert. denied*, 494 U.S. 152 (1990). Harris's petition for *certiorari* was subsequently denied.

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[1] They also testified that Harris was making sincere efforts to deal with his alcoholism.

The Texas Court of Criminal Appeals held, among other things, that it was not necessary to determine whether the jury charge, in violation of *Cobarrubio*, misallocated the burden of proof on voluntary manslaughter. According to the Court of Criminal Appeals, Harris was not entitled to a voluntary-manslaughter charge at all – a conclusion based on the fact that Harris had himself initiated the criminal episode that resulted in Mays's death and on the notion that Mays's lawful conduct in defending Lockard could not, as a matter of law, constitute "adequate cause." 784 S.W.2d at 10. There is no evidence in the record that Harris's trial counsel had ever informed Harris that there was any impediment to the assertion of his only defense, let alone that this legal issue could transform his guilt-innocence trial into a completely futile exercise.

For present purposes, the holding of the Texas Court of Criminal Appeals that Harris was not entitled to a voluntary-manslaughter charge must be accepted. From that premise, it is now clear that the ultimate result for Harris at the guilt-innocence phase of his trial was a foregone conclusion. With Harris's only defensive theory unavailable as a matter of law, Harris's only hope of escaping the death penalty rested on an effective presentation of mitigating evidence at the punishment phase. This stark reality renders the failure (discussed below) of his trial counsel to investigate and present mitigating evidence all the more devastating.

E. State Post-Conviction Proceedings

After his conviction and sentence were affirmed on direct appeal, Harris filed a state *habeas* application. Harris's petition included, among others, a record *Penry* claim,[2] a non-record *Penry* claim, a challenge to the admission during the sentencing phase of evidence of an

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[2] *See Penry v. Lynaugh*, 492 U.S. 302 (1989).

alleged kidnapping of which Harris was acquitted, and a claim for ineffective assistance of counsel.

After the state trial court summarily denied Harris's *habeas* application, the Texas Court of Criminal Appeals remanded the case to the trial court instructing it to hear evidence on Harris's claim of ineffective assistance of counsel. The evidence on remand included a substantial record of compelling mitigating evidence that was available, but was never investigated or presented by Harris's trial counsel. As later described in the Report and Recommendation of Federal Magistrate Judge Wendell Radford, there was mitigating evidence available that:

> Harris suffered intense and consistent emotional abuse at the hands of his father, the trauma of losing his younger brother from drowning at age four, the trauma of being blamed by his father for his brother's death, below-average intelligence, being ostracized at school because of rumors of a homosexual episode, being homosexually gang raped at age 13, three organic brain injuries which required hospitalization, and substance and alcohol abuse from an early age and . . . steady improvement [in Harris's prison record].

It is undisputed that most, if not all, of this evidence was unknown to Dugas and Powell, primarily because they failed to perform any real investigation in preparation for the sentencing phase of Harris's trial.

The state *habeas* court, based on affidavits from Dugas and Powell, nevertheless dismissed out of hand Harris's ineffective-assistance claim. Dugas and Powell both claimed that their failure to investigate and present mitigating evidence was at the direction of Harris himself. Harris allegedly instructed Dugas and Powell to focus only on the

guilt-innocence phase of trial and to refrain from preparing or presenting a case in mitigation. (Assuming Harris gave that instruction (which is denied), it was without the benefit of any warning from Dugas or Powell that Harris's sole defense at guilt-innocence might be unavailable as a matter of law.)

Based on the affidavits of Dugas and Powell, the trial court found that trial counsel performed extensive research and discussed all matters fully with Harris and that the evidence offered at the sentencing phase was a matter of trial strategy. As later determined (after evidentiary hearings) in Harris's federal *habeas* proceeding, there exists convincing evidence rebutting the presumption of correctness[3] otherwise applicable to these findings.[4] The Court of Criminal Appeals nevertheless adopted them.

Ultimately, the Court of Criminal Appeals, with three justices dissenting, issued a published opinion discussing and rejecting Harris's *Penry* claim. *Ex Parte David Ray Harris*, 825 S.W.2d 120 (Tex. Crim. App. 1991). The rest of Harris's claims were denied, in a footnote and without comment, on "the basis of the trial court's findings of fact and conclusions of law." *Id.* at 122, n.3.

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[3] This *habeas* case was filed before April 24, 1996, so the Antiterrorism and Effective Death Penalty Act does not govern review of this case. *Lindh v. Murphy*, 521 U.S. 320, 326-27 (1997).

[4] At the evidentiary hearing in federal court, it was established that the "investigation" conducted by Powell and Dugas consisted of little more than three brief meetings with Harris's mother and a cursory review of some materials she provided. In addition, Powell essentially admitted that he ignored or violated Harris's instructions when he felt it important to do so.

F. Federal Post-Conviction Proceedings

After the Texas Court of Criminal Appeals denied habeas relief, Harris filed a *habeas* petition in federal district court. The case was assigned to the Honorable William Wayne Justice. Judge Justice conducted two evidentiary hearings and then referred the case to Magistrate Judge Wendell Radford. The Magistrate Judge issued a Report and Recommendation recommending that Harris's petition be granted on the ground that he received ineffective assistance of counsel at the punishment phase of his trial. The Magistrate Judge recommended that relief be denied on all other claims raised by Harris.

The district court adopted the Magistrate Judge's recommendation regarding the ineffective-assistance claim. The district court also adopted the recommendation that all of Harris's other claims be denied, except Harris's claim regarding the jury's inability to give mitigating effect during sentencing to the evidence that Mays shot and wounded Harris before Harris ever fired a shot. With respect to that claim, the district court concluded that Harris was entitled to relief because the third special issue, especially when considered in the context of the jury's prior rejection of the voluntary-manslaughter defense, provided no opportunity for the jury to give effect to the mitigating impact of the circumstances of the crime.

Based on these determinations, the district court issued a conditional writ of *habeas corpus* directing the State, within 180 days, to either release Harris, sentence him to life in prison or to provide him with a new sentencing hearing.

The State filed a notice of appeal. Harris cross-appealed with respect to the denial of three of his claims: the record *Penry* claim related to Harris's alcoholism and intoxication at the time of the offense; the claim regarding the

prosecutor's improper jury argument at the guilt-innocence phase of his trial;[5] and the claim regarding the admission of evidence of a kidnapping of which Harris had been acquitted.

G. The Fifth Circuit's Ruling

The Fifth Circuit declined Harris's request for oral argument. On November 18, 2002, the Fifth Circuit reversed the district court's grant of *habeas* relief to Harris, affirmed the denial of all of Harris's other claims for relief, and rendered judgment in favor of the State. Timely petitions for panel and en banc hearing were overruled on December 16, 2002.

With respect to the ineffective-assistance claim, the Fifth Circuit assumed (without deciding) that trial counsel rendered ineffective assistance at the punishment phase of Harris's trial. However, the Court reversed the grant of relief on this claim based on the conclusion that Harris had not satisfied the prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1984). In making this determination, the Fifth Circuit: failed to consider that Harris's crime, on the continuum of capital offenses, was comparatively less brutal and depraved than most; significantly understated the strength of the available mitigating evidence that Harris's counsel failed to present; significantly overstated the strength of certain aggravating evidence; and ignored the impact of the mitigating evidence that was already in the record of Harris's trial, all in violation of *Williams v. Taylor*, 529 U.S. 362 (2000).

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[5] Harris is not now pursuing the claim related to improper jury argument at his guilt-innocence trial.

The Fifth Circuit also rejected Harris's claim regarding the admission of the kidnapping offense of which he had been acquitted. This decision was based on the court's prior opinions regarding evidence of extraneous offenses, which are of dubious validity in light of the principles reaffirmed in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002).

Regarding evidence that Mays shot and wounded Harris first, the Fifth Circuit concluded that the third special issue provided an adequate outlet for the jury to express the mitigating impact of that evidence – even though answering the third special issue "no" would have required the jury to provide an answer that conflicted with its prior rejection at the guilt-innocence phase of Harris's manslaughter defense. The court's conclusion in this regard violates the principles of *Penry v. Lynaugh*, 492 U.S. 302 (1989) ("*Penry I*"), and *Penry v. Johnson*, 532 U.S. 782 (2001) ("*Penry II*").

Finally, with regard to mitigating evidence related to Harris's alcoholism and intoxication at the time of the crime, the Fifth Circuit held first that "neither evidence of alcoholism nor evidence of intoxication at the time of the offense constitutes *Penry* evidence." *Harris v. Cockrell*, 313 F.3d 238, 241-42 (5th Cir. 2002). The court also held, in any event, that intoxication and alcoholism can be given mitigating effect in answers to the first and second special issues. These determinations are in conflict with prior opinions of this Court, as well as the manner in which other circuits treat the mitigating impact of alcoholism and intoxication.

REASONS FOR GRANTING THE PETITION

This case warrants review for four separate reasons. First, the Fifth Circuit's treatment of Harris's ineffective-assistance claim violates *Williams v. Taylor*, 529 U.S. 362

(2000), and conflicts with the approach taken on closely analogous facts by the Third, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits. The Fifth Circuit's methodology would, moreover, render defense counsel's decision to refrain from investigating and presenting mitigating evidence "virtually unchallengeable," much the same way as does the Fourth Circuit approach currently under review by this Court in *Wiggins v. Corcoran*, 288 F.3d 629 (4th Cir. 2002), *cert. granted*, 123 S.Ct. 556 (2002) (No. 02-311).

Second, the Fifth Circuit's ruling that it is permissible to admit evidence of an extraneous offense for which the defendant has been acquitted flies in the face of fundamental principles of fairness reaffirmed by this Court in the closely analogous cases of *Apprendi* and *Ring v. Arizona*.

Third, the Fifth Circuit's treatment of the mitigating impact of evidence that Mays shot first is completely untenable in light of this Court's two *Penry* decisions.

Fourth, the Fifth Circuit's rejection of Harris's record *Penry* claim relating to alcoholism and intoxication violates the fundamental premise that a jury must be able to consider and give effect to all aspects of a defendant's background and character that are offered in mitigation.

ARGUMENT

I.
THE FIFTH CIRCUIT'S TREATMENT OF THE INEFFECTIVE-ASSISTANCE CLAIM RENDERS COUNSEL'S DEFICIENT PERFORMANCE "VIRTUALLY UNCHALLENGEABLE"

Under *Strickland v. Washington*, a defendant asserting ineffective assistance must first "show that counsel's

performance was deficient;" then, the defendant must show "that the deficient performance prejudiced the defense." 466 U.S. at 687.

Here, the Fifth Circuit assumed (without deciding) that the performance of Harris's trial counsel was deficient. There is overwhelming support in the record for the district court's finding to this effect. Clay Dugas admitted that he did absolutely nothing to investigate Harris's background or to prepare otherwise for the sentencing phase of trial. Dennis Powell did not do much more than Dugas. Powell never met with Harris's father. Powell met with Harris's brother for no more than five minutes. Powell never interviewed any family friends – not even Eva Stewart, who attended every day of Harris's trial. While Powell did meet with Harris's mother three times, those meetings were brief and involved no real discussion of the powerful case in mitigation that was available to Harris. Powell did receive materials from Mrs. Harris concerning Harris's background, but he did nothing with them (and did not even tell Harris that he had received them).

The district court, moreover, had before it compelling evidence to reject the excuse offered by Powell and Dugas for failing to develop a case in mitigation. According to Powell and Dugas, they refrained from developing and presenting a mitigation case because Harris told them he wanted to focus only on guilt-innocence and instructed them not to present evidence at the sentencing phase. While there is contrary evidence in the record, it can be assumed for present purposes that Harris in fact gave that instruction. Even with that assumption, the performance of trial counsel was plainly deficient for at least two reasons. First, Harris's alleged decision to focus on guilt-innocence and to refrain from offering a mitigation case was hardly fully informed, in part because Powell and Dugas never told Harris the

critically important fact that his guilt-innocence defense was based on questionable legal grounds and might be unavailable as a matter of law. Second, as Powell freely admitted at the evidentiary hearing in federal court, he did not feel constrained by Harris's instructions and ignored them when he deemed it important to do so. For example, Powell presented testimony at the punishment phase from Evelyn Nora Powell and Nancy Petkovsek, even though doing so violated Harris's instructions. Having violated Harris's instructions by presenting a fraction of the available evidence in mitigation, Powell and Dugas can hardly use Harris's alleged instruction to explain away their failure to present the rest of the powerful mitigation case that was available to Harris.[6]

With respect to *Strickland's* prejudice prong, the Fifth Circuit brushed aside Harris's arguments by suggesting that Harris's mitigating evidence was as "weak" as that described in *Duhamel v. Collins*, 955 F.2d 962 (5th Cir. 1992) (a case in which no prejudice was found), and not as compelling as the mitigating evidence in *Williams*, 529 U.S. 362 (2000) (a case affirming relief under *Strickland*). In performing its comparison of this case to *Duhamel* and *Williams*, the Fifth Circuit violated a fundamental principle set forth in *Williams*: that the "prejudice determination" must include an evaluation of "the totality of the available mitigation evidence – both that adduced at trial and the evidence in the habeas proceeding." 529 U.S. at 397-98.

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[6] Numerous cases recognize, in similar circumstances, that the defendant's instructions do not necessarily relieve counsel of the duty to investigate and present mitigating evidence. *See, e.g., Karis v. Calderon*, 283 F.3d 1117, 1136 (9th Cir. 2002); *Silva v. Woodford*, 279 F.3d 825, 838 (9th Cir. 2002); *Coleman v. Mitchell*, 268 F.3d 417, 447-48 (6th Cir. 2001); *Battenfield v. Gibson*, 236 F.3d 1215, 1233 (10th Cir. 2001).

The Fifth Circuit violated this principle by, among other things, failing to consider the facts and circumstances of Harris's crime. For example, the death of Mark Mays paled in comparison to the brutal sexual assault and murder of a nine-year old girl that had occurred in *Duhamel*. While comparatively "weak" mitigating evidence may not have made a difference in *Duhamel*, that same evidence could well have tipped the balance in favor of Harris, who was involved in an impulsive shooting in reaction to having himself been shot and wounded.

The Fifth Circuit also violated the principles of *Williams* by failing to consider the mitigating evidence that did make its way into the record, despite counsel's deficient performance. That evidence included: Harris's youth at time of the offense; Harris's cooperation with the police investigation; Harris's genuine remorse; Harris's intoxication at the time of the crime; Harris's status as a severe alcoholic and drug addict; Harris's intoxication during all of the prior extraneous offenses offered by the State at the punishment hearing; and Harris's sincere efforts, at the time of the crime, to overcome his alcoholism and drug addiction. Viewing the evidence that Harris's counsel failed to offer in isolation from the evidence that was in the record was plainly wrong. The cumulative impact of the record and non-record evidence may well have made a difference in Harris's case – but the Fifth Circuit never conducted that analysis.

The Fifth Circuit also ran afoul of *Williams* by suggesting that prejudice cannot result from the failure to present double-edged evidence that can be considered both aggravating and mitigating. The Fifth Circuit concluded, in discounting the existence of prejudice, that "[t]he jury could have viewed much of the evidence omitted by Harris's trial counsel as either mitigating or aggravating." 313 F.3d at 244. This same circumstance existed in *Williams*, where the

Court noted that, "[o]f course, not all the additional evidence was favorable to Williams." 529 U.S. at 396. Nevertheless, the Court in *Williams* concluded that there was prejudice – a finding that the Fifth Circuit seemed barely willing even to consider.

Finally, the Fifth Circuit compounded its errors by also discounting the existence of prejudice based on what it described as "overwhelming evidence of violence in Harris's background." 313 F.3d at 244. The court did not in its opinion detail any of that evidence and, as Harris pointed out in his petitions for rehearing, the record simply does not support the assertion that there is "overwhelming evidence of violence in Harris background."

The problem becomes even clearer when Harris's case is compared to the results reached in other circuits on similar facts. Indeed, the Third, Sixth Seventh, Eighth, Ninth, Tenth and Eleventh Circuits would all have likely affirmed relief for Harris based on precedent involving analogous facts.[7] In each of the cases cited in the footnote, the omitted mitigating evidence was of the same type (childhood abuse, below-average intelligence, possible brain damage) as the evidence that Harris's lawyers failed to present. In some of these cases, the mitigating evidence appears to be significantly weaker than Harris's evidence; in other cases, while the

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[7] *See, e.g., Jermyn v. Horn*, 266 F.3d 257 (3d Cir. 2001); *Coleman v. Mitchell*, 268 F.3d 417 (6th Cir. 2001); *Austin v. Bell*, 126 F.3d 843 (6th Cir. 1997); *Brewer v. Aiken*, 935 F.2d 850 (7th Cir. 1991); *Simmons v. Luebbers*, 299 F.3d 929 (8th Cir. 2002); *Antwine v. DeLo*, 54 F.3d 1357 (8th Cir. 1995); *Mayfield v. Woodford*, 270 F.3d 915 (9th Cir. 2001); *Ainsworth v. Woodford*, 268 F.3d 868 (9th Cir. 2001); *Battenfield v. Gibson*, 236 F.3d 1215 (10th Cir. 2001); *Hooper v. Mullin*, 314 F.3d 1162 (10th Cir. 2002); *Collier v. Turpin*, 177 F.3d 1184 (11th Cir. 1999); *Dobbs v. Turpin*, 142 F.3d 1383 (11th Cir. 1998).

mitigating evidence could be characterized as slightly stronger than Harris's, it is balanced against evidence of a crime far more brutal and depraved than Harris' offense. Each of these cases demonstrates that – even if it purports to apply the same legal standards – the Fifth Circuit is simply our of step with the majority of other circuits when it comes to evaluating prejudice under *Strickland*.

In *Wiggins v. Corcoran*, this Court recently granted certiorari to consider the Fourth Circuit's approach to *Strickland v. Washington* in the context of trial counsel's failure to investigate and present mitigating evidence. In *Wiggins*, the Fourth Circuit considered only the performance prong of *Strickland* and did not reach the prejudice prong. *Wiggins v. Corcoran*, 288 F.3d at 643 n.9. In this case, the Fifth Circuit assumed deficient performance and considered only the prejudice prong of *Strickland*. The basic problem, however, remains the same. The Fourth Circuit's approach to the performance prong rendered counsels' failure to develop mitigating evidence "virtually unchallengeable." The Fifth Circuit's approach likewise precludes any meaningful challenge to the failure to develop and present mitigating evidence, especially if a reviewing court can ignore in its prejudice analysis the circumstances of the crime and the other mitigating evidence in the record.

There is a pressing need to grant review in this case so that this Court can establish a fair, rational and consistent system for reviewing ineffective-assistance claims in the context of trial counsel's failure to investigate and present available mitigating evidence. In Harris's case, two federal trial judges (Judge Justice and Magistrate Judge Radford) have concluded that Harris was prejudiced by counsels' deficient performance. Three federal appellate judges, on the other hand, have concluded that Harris was not prejudiced. And, of course, the twelve people who mattered most –

Harris's jury – were not given the opportunity to decide. Harris respectfully suggests – where, as here, counsels' deficient performance undermines the very essence of the individualized sentencing determination required by the Eighth Amendment – that relief should not turn on which federal judges happen to have the last vote.

II.
THE FIFTH CIRCUIT'S TREATMENT OF THE ACQUITTAL ISSUE VIOLATES THE PRINCIPLES OF FAIRNESS RECOGNIZED IN *APPRENDI* AND *RING V. ARIZONA*

The death of Mark Mays became a capital offense only because it occurred in the course of the kidnapping of Roxanne Lockard. Accordingly, any evidence that Harris had committed prior kidnappings would likely be of great significance to jurors considering the appropriate punishment for David Ray Harris. This fact was not lost on the State, which went to extraordinary lengths to inflame the jury with "evidence" that Harris had kidnapped before.

The State offered evidence that Harris was guilty of a prior kidnapping that had allegedly taken place in California in 1979. Ray Rucker, a peace officer from California, was allowed to testify that Harris was, in Rucker's opinion, guilty of that prior kidnapping. This evidence was admitted even though Harris was acquitted of the kidnapping offense by a jury in California.

It violates fundamental principles of fairness reaffirmed in this Court's recent decisions to allow the State to use an alleged crime of which the defendant has been acquitted to convince the jury of the existence of the aggravating factors that must be found before a sentence of death can be imposed.

The Fifth Circuit rejected this claim based on its prior decision in *Vega v. Johnson*, 149 F.3d 354 (5th Cir. 1998), *cert. denied*, 525 U.S. 1119 (1999). In *Vega*, the State offered evidence at the punishment phase of a capital case that the defendant had previously committed the crime of being a felon in possession of a handgun. The defendant, however, had been acquitted of that crime. The Fifth Circuit started its analysis from the premise that "[e]xtraneous offenses offered at the punishment phase of a capital trial need not be proven beyond a reasonable doubt." *Id.* at 359. "[B]ecause the standard of proof at the punishment hearing [in a capital case is] lower than that at the original criminal trial," the court discerned no constitutional impediment to allowing the subsequent capital jury to consider evidence of an alleged crime of which the prior jury had acquitted the defendant. *Id.*[8] Presumably, the court was of the view that, while the first jury may not have been convinced beyond a reasonable doubt that the defendant had committed the crime, the second jury might find, to some lesser degree of certainty, that the defendant was guilty of the offense. Based on the existence of different standards of proof, the Fifth Circuit was untroubled by collateral estoppel and double jeopardy concerns.

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[8] The Fifth Circuit would have been forced to reach a different result in a non-capital case. The Texas Code of Criminal Procedure requires, in a non-capital case, that extraneous crimes or bad acts introduced in aggravation of a sentence must be shown beyond a reasonable doubt. Tex. Code Crim. Pro. Art. 37.07 § 3(a) (West Supp. 2003) (evidence relevant to sentencing includes "evidence of an extraneous crime or bad act that is shown beyond a reasonable doubt by evidence to have been committed by the defendant"). The same protection is not provided a capital defendant. Tex. Code Crim. Pro. Art. 37.071; *Boyd v. State*, 811 S.W.2d 105 (Tex. Crim. App.), *cert. denied*, 502 U.S. 971 (1991).

The Fifth Circuit's treatment of the issue of admitting evidence of crimes for which the defendant was acquitted turns in part on the validity of the proposition that extraneous offenses offered at the punishment phase of a capital trial need not be proven beyond a reasonable doubt. In *Vega*, the court offered no guidance as to what standard of proof is required, but indicated only that it is something less than "beyond a reasonable doubt." The court cited for this proposition only other Fifth Circuit cases and one opinion from this Court – *Huddleston v. United States*, 485 U.S. 681 (1988). *Huddleston* concerned only whether a trial court was required, before admitting evidence of similar acts under Fed. R. Evid. 404(b), to make a preliminary finding that the similar act had been proved by a preponderance of the evidence. *Huddleston* simply does not support the Fifth circuit's rule regarding the standard of proof applicable to extraneous offenses at sentencing.

Two recent cases from this Court reveal the error of the Fifth Circuit's approach to the admission of extraneous offenses for which a defendant has been acquitted. In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court invalidated a New Jersey procedure under which the sentence for a crime could be enhanced, upon a judge's post-conviction finding by a preponderance of the evidence that the crime had been motivated by racial animus. This Court held that, "'[I]t is unconstitutional . . . to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.'" *Id.* at 40 (quoting from *Jones v. United States*, 526 U.S. 227, 252-53 (1999) (Stevens, J., concurring)).

In *Ring v. Arizona*, 536 U.S. 584, 112 S.Ct. 2428, 153 L.Ed. 556 (2002), the reasoning of *Apprendi* was applied in

the context of the evidence offered at the sentencing phase of a capital case. In *Ring*, the Arizona death-penalty statute allowed the trial judge, after a jury verdict of first-degree murder, to determine the presence or absence of aggravating factors required by Arizona law for the imposition of the death penalty. The Court found that procedure inconsistent with *Apprendi* – without regard to whether the aggravating factors to be assessed by the trial judge were considered "elements of the offense" or "sentencing factors." *Id.* at 153 L.Ed. at 574.[9]

As Justice Scalia stated in his concurring opinion in *Ring*, "the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to the imposition of the level of punishment that the defendant receives . . . must be found by the jury beyond a reasonable doubt. *Ring*, 563 U.S. at 578 (Scalia, J., concurring).

It is difficult to square the underpinning of the Fifth Circuit's *Vega* opinion – that extraneous offenses offered at a capital sentencing hearing need not be proven beyond a reasonable doubt – with this Court's holdings in *Apprendi v. New Jersey* and *Ring v. Arizona*. If the Fifth Circuit's premise is not valid, then the use at a capital sentencing hearing of a crime of which the defendant has been acquitted raises serious questions under *Gardner v. Florida*, 430 U.S. 349 (1977) (holding that a capital defendant is entitled to due process at the punishment phase);and *Ashe v. Swenson*, 397

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[9] The precise issue in *Ring* was whether the judge or a jury must assess the aggravating factors that make a death sentence available – and the Court determined, based on *Apprendi*, that a jury resolution is constitutionally required. However, the requirement that a jury must assess the facts carries with it the related constitutional requirement that the jury's determination must be based on proof beyond a reasonable doubt.

U.S. 436 (1970) (holding that collateral estoppel is a requirement of due process). It also implicates the presumption of innocence, which still applies at the sentencing phase with respect to crimes other than the one of which the defendant has just been convicted. *See Herrera v. Collins*, 506 U.S. 390, 399 (1993).

This Court should grant review to consider, especially in light of *Apprendi* and *Ring v. Arizona*, whether and in what circumstances the State may introduce at a capital sentencing hearing evidence of a crime of which the defendant has already been acquitted.

III.
THE JURY WAS NOT ALLOWED TO GIVE MITIGATING EFFECT TO THE EVIDENCE THAT HARRIS DID NOT SHOOT UNTIL WOUNDED BY MAYS

It is established beyond any doubt that "the circumstances of the offense" can operate as mitigating factors from which a jury must be allowed to express a "reasoned moral response" that the defendant should not be put to death. *See Penry*, 492 U.S. at 328 (citing *Franklin v. Lynaugh*, 487 U.S. 164, 184 (1988) (O'Connor, J., concurring in judgment)). Here, there are aspects of the crime – most particularly, that Mays initiated the exchange of gun fire and that Harris did not shoot until he had already been himself wounded in the neck and shoulder – that could have led a juror to express the reasoned moral response that Harris's life should be spared. The question presented is whether Texas's three special issues provided a full and fair outlet for a juror to express that view.

On this point, the Fifth Circuit focused entirely on the third special issue. Before addressing that issue, Harris would point out that neither the first nor the second issue

provides an adequate outlet for the jury to express fully the potentially mitigating impact of this evidence. Arguably, the evidence that Mays shot first is relevant to the first special issue, which asks whether the defendant's conduct was "committed deliberately" with the "reasonable expectation" that the victim or another would die. However, especially because Texas courts provided jurors with no definition of the term "deliberately," it is possible that a reasonable juror could have concluded that Harris acted "deliberately," while still believing that Harris's life should be spared (because he did not initiate the gun battle and because his "deliberate" acts were undertaken in response to being shot and wounded by Mays). The evidence concerning Mays' initiation of the exchange of gun fire thus has mitigating impact beyond the scope of the first special issue.

The second special issue likewise did not provide a full opportunity for a juror to express the mitigating impact of this evidence. Arguably, the fact that Harris did not shoot until fired upon suggests that he may be less likely to "commit criminal acts of violence that will constitute a continuing threat to society." However, a rational juror could have concluded (based, for example, on evidence of extraneous offenses) that Harris did constitute a continuing threat, while at the same time believing that the death penalty was inappropriate here (because, with respect to the death of Mark Mays, Harris only fired after being himself wounded by Mays). Thus, the mitigating impact of this evidence also has relevance beyond the scope of the second special issue.

The third special issue asks whether "the conduct of the defendant in killing the deceased [was] unreasonable in response to the provocation, if any, by the deceased." This special issue would arguably allow a juror to vote to spare Harris's life based on the fact that Mays shot first, but only if that juror believed that Mays's conduct constituted

"provocation" (a term that was not defined in the jury charge) and that Harris's conduct in shooting Mays was not "unreasonable." However, it is entirely possible that a rational juror could deem the death penalty inappropriate (because Harris did not shoot until wounded), even if that juror had concluded that Mays's conduct did not constitute "provocation" or that Harris's conduct was not "reasonable."[10] The third special issue provided no mechanism for such a juror to express that view.

Even if the third special issue is viewed in the abstract as providing a mechanism to express the mitigating impact of the evidence that Mays shot Harris first, there remains a unique aspect of this case that raises a constitutional defect in the procedure by which Harris was sentenced to die. After this Court decided *Penry I*, the defendant in that case was retried in Texas state court and convicted again of capital murder. At the sentencing phase of his second trial, the jury was asked the same three special issues discussed in *Penry I*. In addition, the jury was also given what has been described as a "nullification instruction" – jurors were told that, if the mitigation evidence convinced them that Penry should not receive the death penalty, they should simply change to "no" one of their "yes" answer to the three special issues. This Court held in *Penry II* that this instruction prevented the jury from giving effect to mitigating evidence because it rendered

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[10] The third special issue, in reality, has little, if any, utility. It is difficult to imagine circumstances in which a rational juror who believed the defendant guilty of capital murder would also determine that the defendant's conduct was reasonable (*i.e.*, that it was not unreasonable). In addition, the third special issue is arguably nullified by an affirmative answer to the first special issue: A determination that the defendant acted "deliberately" with a "reasonable expectation" that someone would die would appear to foreclose a determination in response to the third special issue, that the defendant acted reasonably.

the jury charge contradictory and confusing. The Court found that this scheme put jurors in the untenable position of giving untrue answers to the special issues in order to give effect to mitigating evidence. 532 U.S. at 880.

Although the jury in this case did not receive the nullification instruction given in *Penry II*, the district court correctly determined that the jury charge in Harris's case contained a similar defect. At the guilt phase of his trial, Harris offered evidence that the victim shot him first in the context of Harris's position that he was guilty of voluntary manslaughter, not murder. In rejecting his manslaughter defense, the jury found that Harris's conduct was not committed "under the immediate influence of sudden passion based upon adequate cause." At the sentencing phase, a juror who believed that Harris should receive a life sentence instead of the death penalty (because he shot Mays only after the victim shot him first) could only do so by answering in the negative the third special issue – finding that the killing was not unreasonable in response to the deceased's provocation, if any. Because such an answer would appear to a reasonable juror inconsistent with the answer given on manslaughter at the guilt phase of the trial, the juror could not logically and honestly answer the third special issue in the negative. Accordingly, even if the third special issue would otherwise have provided a means to give mitigating effect to the evidence that Mays shot first, it did not do so in the particular circumstances of this case. *See Penry II*, 532 U.S. at 804.

The Fifth Circuit rejected the district court's finding on this point based, in part, on the conclusion that the "state trial court's construction of the third special issue defines the provocation inquiry more broadly than is the case with the guilt-innocence inquiries of self-defense and manslaughter." 313 F.3d at 243. This is indeed an ironic conclusion in light

of the fact that Harris's jury received no definition from the trial court of the meaning of the term "provocation" as used in the third special issue. Moreover, Texas cases addressing the meaning and purpose of the third special issue do not make clear that the inquiry is broader than the manslaughter question asked at the guilt phase. To the contrary, the Texas cases suggest that the third special issue does nothing more than re-ask the same question previously answered in the voluntary-manslaughter charge. In *Evans v. State*, 601 S.W.2d 943 (Tex. Crim. App. 1980), a case cited by the Fifth Circuit, the problem is made very clear:

> If read literally, the [third special] issue would apply only in situations wherein the offense is really voluntary manslaughter rather than capital murder. Indeed, the requirement that the killing be reasonable is a more difficult requirement to meet than that for reduction to manslaughter.

Id. at 946 (quoting from Crump, Capital Murder: The Issues in Texas, 14 Hous. L. Rev. 531, 560 (1977)). Although the court in *Evans* apparently believed that the jury was not required to read the special issue "literally," the jury is provided with no option but to do so, and a reviewing court should presume that the jury did in fact follow the instructions. *Penry II*, 532 U.S. at 799. A literal reading of the jury instruction and special issues gives rise to the problem identified by the district court here: the voluntary-manslaughter charge and the third special issue ask essentially the same question.

The congruence between the manslaughter charge and the third special issue raises essentially same problem identified in *Penry II*. Any juror who believed that Harris's life should be spared because he had not initiated the gun battle could express that view only by answering the third

special issue contrary to the answer previously given to essentially the same question during the guilt-innocence phase. Review is appropriate in this case to address this unconstitutional restriction on the jury's ability to give full effect to the mitigating evidence in the record concerning the circumstances of the crime.

IV.
THE JURY WAS NOT ALLOWED TO GIVE MITIGATING EFFECT TO HARRIS'S EVIDENCE OF ALCOHOLISM AND INTOXICATION

In *Penry I*, 492 U.S. at 302, this Court held unconstitutional the Texas death-penalty sentencing scheme used at Harris's trial as applied in a case involving mitigating evidence not relevant to, or with relevance beyond the scope of, the three special issues. That holding was based on the concept, recognized in *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion), that the Eighth and Fourteenth Amendments require that the capital sentencer "not be precluded from considering, *as a mitigating factor*, **any** aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (italicized emphasis in original; bold emphasis added); *see also Eddings v. Oklahoma*, 455 U.S. 104, 113-14 (1982) (capital sentencer must be allowed to consider and give effect to "any relevant mitigating evidence") (emphasis added).

In *Penry II*, this Court reaffirmed these principles and emphasized that a jury must be allowed to give "'full consideration and full effect'" to a defendant's mitigating evidence. 532 U.S. at 797 (quoting *Johnson v. Texas*, 509 U.S. 350 (1993) (O'Connor, J., dissenting)).

Here, there was mitigating evidence in the record that Harris was a severe alcoholic and drug addict and that he

was intoxicated at the time of every extraneous offense that the State offered at the sentencing phase in an effort to convince the jury that Harris constituted a continuing threat to society. Although the State disputes this fact, Harris also contends that there was evidence in the record that Harris was intoxicated at the time of Mark Mays' death.

The State understood that evidence of Harris's alcoholism and drug abuse (linked as it was to all of Harris's prior criminal activity) had an aggravating edge. Dr. Gripon, a psychiatrist proffered by the State at the sentencing phase (even though he had never examined Harris) opined that "a history of drugs and substance and alcoholic abuse" is a strong predictor of violent behavior in the future. Also, the State's cross-examination of Harris's witnesses at the sentencing phase focused on the aggravating qualities of alcoholism.

Because evidence of alcoholism and drug abuse can also have a mitigating impact, it is the classic type of double-edged evidence discussed in *Penry I*. The jury must have been provided with an outlet for expressing both the aggravating and the mitigating impact of that evidence. *Penry I*, 492 U.S. at 319.

The Fifth Circuit dealt with this claim by first concluding that "neither evidence of alcoholism nor intoxication at the time of the offense constitutes *Penry* evidence." 313 F.3d at 241-42. The court cited its own precedent – but no decision from this Court – for the proposition that *Penry* evidence must constitute a "uniquely severe permanent handicap" with which the defendant "was burdened through no fault of his own" and that "voluntary intoxication" and "self-inflicted chronic drug and alcohol abuse and the resulting arrested emotional development" do not rise to that level. 313 F.3d at 242.

The Fifth Circuit's exceedingly narrow definition of *Penry* evidence has never been adopted by this Court and, in fact, flies in the face of the repeated recognition by this Court that a jury must be able to consider and give effect to all aspects of a defendant's background and character that are offered in mitigation. *See, e.g., Eddings v. Oklahoma*, 455 U.S. at 110; *Lockett v. Ohio*, 438 U.S. at 604; *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion).

Furthermore, it ignores this Court's recognition of the "belief, long held by this society, that defendants who commit criminal acts that are attributable to . . . emotional and mental problems, may be less culpable than defendants who have no such excuse." *Boyde v. California*, 494 U.S. 370, 382 (1990).

The Fifth Circuit's categorical refusal to consider as *Penry* evidence alcoholism and drug addiction appears to be based on outdated notions, discredited long ago, that alcoholism and drug addiction are voluntary choices for which blame should be ascribed. Alcoholism has long been recognized to be a disease. *See* American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 3d ed. (DSM-III 166-175 (1987).

The Fifth Circuit's approach also seems to be based on the notion that society does not view alcoholism, drug addiction and intoxication as having any true mitigating impact. Contrary to the Fifth Circuit's approach, there is ample evidence that society views alcoholism and drug addiction as bearing on moral culpability for criminal conduct. This is perhaps best demonstrated by the requirement in many states that such evidence be considered as statutory mitigating factors. *See, e.g.*, Cal. Penal Code Sec. 190.3(d) (Matthew Bender 2003); Ill. Ann. Stat. Ch. 38,

¶ 9-1(c); La. Code Crim. Proc. Ann. art. 905.5; Md. Ann. Code art. 27, § 413(c)(iii). Even the State of Texas, in non-capital cases, recognizes that voluntary intoxication can constitute a mitigating factor. *See* Tex. Penal Code § 8.04.

This Court should grant review to address this conflict in the case law and to clarify that alcoholism and intoxication constitute *Penry* evidence.

After holding that alcoholism and intoxication do not constitute *Penry* evidence, the Fifth Circuit went on to hold that, in any event, the second special issue provides "a means" for giving effect to evidence of alcoholism. 313 F.3d at 242. However, the appropriate inquiry under *Penry I* and *Penry II* is whether the special issue gives the jury the means to afford "full consideration and full effect" to the mitigating evidence. *Penry II*, 532 U.S. at 797. Plainly, the second special issue provided the jury a opportunity to express the aggravating impact of Harris's alcoholism (especially in light of Dr. Gripon's testimony and the evidence that all of Harris's prior crimes were committed under the influence), but it just as plainly did not provide any outlet to express the mitigating side of that evidence.

The Fifth Circuit also said that the mitigating impact of intoxication can be "fully considered under the first special issue." While it may be correct that the first special issue provides some opportunity to consider evidence of intoxication, the court failed to explain how the separate evidence of Harris's alcoholism can be addressed within the context of that special issue. Simply put, a juror who believed that Harris's life should be spared because of his alcoholism (and the fact that all his extraneous offenses were alcohol-related) had no means to express that view in answer to the first special issue, which asked only whether the shooting of Mark Mays was deliberate.

The Court should also grant review to consider the important question of whether evidence of alcoholism, drug addiction and intoxication can be fully considered in the context of the three special issues posed to Harris's jury.

CONCLUSION

The petition for writ of *certiorari* should be granted.

Respectfully submitted

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Dated: March 17, 2003

APPENDIX

A. Opinion of the United States Court of Appeals for the Fifth Circuit, No. 01-41395; *David Ray Harris v. Janie Cockrell, Director, Texas Department of Criminal Justice, Institutional Division* (On Appeal from the United States District Court for the Eastern District of Texas (1:92-CV-167)), published at 313 F.3d 238 (5th Cir. 2002)

B. Judgment, No. 01-41395

C. Order Denying Petition of Rehearing and Rehearing En Banc, No. 01-41395

E. Report and Recommendation of United States Magistrate Judge, C.A. No. 1:92-CV-167

F. Memorandum Opinion, C.A. No. 1:92-CV-167

G. 28 U.S.C. §2254 (prior to the amendments in 1996 of the Antiterrorism and Effective Death Penalty Act)

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-41395

U.S. COURT OF APPEALS
FILED
NOV 18 2002
CHARLES R. FULBRUGE
CLERK

DAVID RAY HARRIS,

Petitioner-Appellee-
Cross-Appellant,

VERSUS

JANIE COCKRELL,
DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent-Appellant-
Cross-Appellee.

Appeals from the United States District Court
for the Eastern District of Texas

Before JOLLY, SMITH, and EMILIO M. GARZA, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

The State of Texas appeals the grant of a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petitioner, David Harris, crossappeals the rejection of his claims that the jury in his capital trial was unconstitutionally precluded from giving mitigating effect to evidence of his alcoholism and that the admission of evidence of an extraneous offense of which he had been acquitted denied him a fair trial. We affirm in part, reverse in part, and render judgment in favor of the state.

Roxanne Lockard, were sleeping. Armed with a revolver, Harris went into the bedroom and awakened them. After instructing Mays to lock himself in the bathroom, Harris led Lockard out of the apartment at gunpoint and directed her to get into his truck.

Mays emerged from the apartment with a gun, and the two men exchanged fire. According to Harris, Mays shot first, hitting Harris in the neck, then in the shoulder, before Harris began shooting at Mays. After shooting Mays several times, once at close range, Harris left. He was found guilty of capital murder.

This appeal raises several claims related to the conduct of the sentencing phase of the trial. The state appeals the district court's grant of habeas relief that was based on two of Harris's claims: first, that the special instructions given to the jury failed to provide an adequate vehicle for the jury to give effect to Harris's evidence of provocation; and second, that the failure of counsel to present certain items of potentially mitigating evidence constituted ineffective assistance. Harris crossappeals the rejection of his additional claims that the special issues were unconstitutionally flawed in that they precluded the jury from giving effect to evidence

of Harris's alcoholism; that the prosecutor's allegedly improper closing argument during the guilt-innocence phase denied Harris a fair trial; and that Harris was denied a fair sentencing determination by the admission of evidence of an extraneous offense of which he had been acquitted. The district court erred in deciding that the jury instructions at the punishment phase provided an insufficient vehicle for the jury to give effect to Harris's mitigating evidence related to provocation and that Harris was prejudiced by ineffective assistance of counsel. We affirm the rejection of the remaining claims.

II.

At the sentencing phase, the jury answered affirmatively the three special issues related to deliberateness, future dangerousness, and inadequate provocation. Consequently, Harris was sentenced to death. Citing *Penry v. Lynaugh ("Penry I")*, 492 U.S. 302 (1989), and *Penry v. Johnson ("Penry II")*, *532* U.S. 782 (2001), Harris contended that the Texas special issues frame work was unconstitutional as applied to his case, because it precluded the jury from giving effect to potentially mitigating evidence related to provocation by the victim and Harris's alcohol abuse. The district court granted relief on the claim based on the evidence of provocation and rejected the claim as to evidence of alcohol abuse. We conclude that the special issues permitted the consideration of both types of mitigating evidence.

A.

In *Penry I*, 492 U.S. at 328, the Court held that the Texas special issues were constitutionally deficient as applied to the defendant, because they failed to provide the sentencing jury with an adequate means of giving effect to

mitigating evidence of severe mental retardation and abuse. Harris claims that these special issues likewise precluded the jury from giving mitigating effect to his evidence of alcohol abuse, in violation of *Penry I*.

To form the basis of a *Penry* claim, mitigating evidence "must demonstrate a 'uniquely severe permanent handicap[] with which the defendant was burdened through no fault of his own.'"[1] Under this definition, neither evidence of alcoholism nor evidence of intoxication at the time of the offense constitutes *Penry* evidence.[2]

The jury was able to give mitigating effect to the evidence of Harris's alcoholism through its answers to the first and second special issues. Evidence of intoxication can be fully considered under the first special issue,[3] which

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[1] *Turner v. Johnson*, 106 F.3d 1178, 1189 (5th Cir. 1997) (quoting *Graham v. Collins*, 950 F.2d 1009, 1029 (5th Cir. 1992) (en banc), *aff'd*, 506 U.S. 461 (1993)).

[2] *See Lackey v. Scott*, 28 F.3d 486, 489 (5th Cir. 1994) ("Unlike Penry's mental retardation and childhood abuse, 'voluntary intoxication is not the kind of uniquely severe permanent handicap[ ] with which the defendant was burdened through no fault of his own that requires a special instruction to ensure that the mitigating effect of such evidence finds expression in the jury's sentencing decision.'" (quoting *Cordova v. Collins*, 953 F.2d 167, 170 (5th Cir. 1992) (internal quotes omitted)); *Tucker v. Johnson*, 115 F.3d 276, 282 5th Cir. 1997) ("[S]elf-inflicted chronic drug and alcohol abuse and the resulting arrested emotional development do not constitute a unique handicap 'with which the defendant was burdened through no fault of his own.'").

[3] The first special issue reads as follows: "Was the conduct of the defendant that caused the death of the deceased committed

asked the jury to evaluate the deliberateness of Harris's conduct.[4] Furthermore, to the extent that "alcoholism has independent mitigating weight apart from intoxication at the time of a crime," *James*, 987 F.2d at 1121 n.6, the second special issue, which relates to future dangerousness,[5] provided a means forgiving mitigating effect to Harris's evidence that he is an alcoholic. *See Id.* at 1121.

Trial counsel presented testimony at the sentencing phase that Harris's history of violent conduct stemmed from his alcoholism, which could be brought under control. The jury reasonably could have considered this testimony when evaluating whether Harris was a continuing danger to society. *See Id.* Therefore, the district court was correct in rejecting Harris's *Penry* claims based on his mitigating evidence related to alcoholism and intoxication.

B.

Citing *Penry II*, the district court held that the third special issue[6] did not provide the jury with an effective means for consideration of evidence that Mays fired his

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deliberately and with the reasonable expection *[sic]* that the death of the deceased or another would result?"

[4] *Tucker*, 115 F.3d at 282; *Lackey*, 28 F.3d at 489; *James v. Collins*, 987 F.2d 1116, 1121(5th Cir. 1993); *Cordova v. Collins*, 953 F.2d at 170.

[5] The second special issue reads: "Is there a probability that the defendant will commit criminal acts of violence that will constitute a continuing threat to society?"

[6] The third special issue poses the question: "Was the conduct of the defendant in killing the deceased unreasonable in response to the provocation, if any by the deceased?"

weapon first. In *Penry II*, 532 U.S. at 789, jurors were given the same three special issues submitted in this case. They also were given a supplemental "nullification instruction," directing jurors to answer any special issue in the negative, irrespective of the evidence on that special issue, if they believed the mitigating circumstances rendered a life sentence more appropriate than death. *Id.* at 789-90. In essence, the jury could give effect to the nullification instruction only by answering one of the special issues untruthfully. *Id.* at 799. The Court held that this nullification instruction failed to provide an adequate vehicle for the jury to make a reasoned moral response to Penry's mitigating evidence, because it "it made the jury charge as a whole internally contradictory, and placed law-abiding jurors in an impossible situation." *Id.*

The district court noted that by rejecting Harris's defense of voluntary manslaughter, the jury found that the killing was not done "under the immediate influence of passion based upon adequate cause" At the sentencing phase, the court continued, a juror who believed that Harris should receive a life sentence instead of the death penalty, because the victim shot first, could act on that belief only by answering in the negative the third special issue, which addresses whether the defendant's conduct in killing the victim was reasonable in light of any provocation.

The court reasoned that such a response would be inconsistent with the jury's rejection of Harris's manslaughter defense and that a juror could not logically answer the third special issue in the negative. As a result, the court concluded, the jury could not give mitigating effect to the evidence of provocation.

Penry II is inapplicable here, because the jurors were not directed to give untruthful responses or to violate their oaths to give effect to the mitigating evidence. There are no internal contradictions of the sort created by the nullification instruction considered in *Penry II*. Further, even if *Penry II* were applicable, the district court erred in holding that a negative answer to the third special issue is inconsistent with the jury's rejection of the voluntary manslaughter defense at the guilt-innocence phase.

The state trial court's construction of the third special issue defines the provocation inquiry more broadly than is the case with the guilt-innocence inquiries of self-defense and manslaughter.[7] In other words, a reasonable jury could find that the evidence of provocation was insufficient to justify a verdict of voluntary manslaughter but sufficient to justify a negative answer to the third special issue. Indeed, Harris's trial counsel specifically told the jurors, during argument at the punishment phase, that their guilty verdict did not foreordain an affirmative answer to the third-special issue. Therefore, the district court erred in granting relief to Harris on this issue.

III.

The district court held that counsel's failure to present certain items of potentially mitigating evidence at the punishment phase constituted ineffective assistance of counsel. In particular, the court cited the failure of trial counsel to introduce evidence concerning Harris's troubled

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[7] *See Evans v. State*, 601 S.W.2d 943, 946 (Tex. Crim. App. 1980); *Brown v. State*, 554 S.W.2d 677, 678-79 (Tex. Crim. App. 1977).

childhood and family background, drug and alcohol problems, and prior prison record.

We need not decide this question, for, even assuming *arguendo* the correctness of the court's substituted findings and its conclusion that counsel's conduct constituted deficient performance, the court erred in holding that this performance prejudiced the defense under *Washington*, 466 U.S. at 694, which requires the claimant to demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." In the context of a claim that counsel rendered ineffective assistance by failing to present evidence at the punishment phase of a capital murder trial, the inquiry is whether there is a reasonable probability that, had the evidence been presented, it would have altered the punishment verdict.[8]

The district court based its finding of prejudice on its comparison of the circumstances of Harris's case to those in two similar cases, *Duhamel v. Collins*, 955 F.2d 962 (5th Cir. 1992), and *Williams v. Taylor*, 529 U.S. 362 (2000). Harris's mitigating evidence is similar to that which this court characterized as "weak" in *Duhamel*, 955 F.2d at 966. The proposed evidence of Harris's mental retardation is his IQ score of 88 in the seventh grade. This is not strongly

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[8] *See Washington*, 466 U.S. at 695; *Mann v. Scott*, 41 F.3d 968, 983-84 (5th Cir. 1994).

mitigating evidence such that its omission is likely to cause prejudice.[9]

Similarly, the evidence of an abusive childhood is less than compelling. Harris's evidence of abuse includes testimony that, although he was raised in a stable family environment, his father played favorites among his children and blamed Harris for the death of his brother. This evidence pales in comparison to that omitted by the trial attorneys in *Williams,* in which the Court held that the defendant had proved prejudice. The mitigating evidence available there demonstrated that the defendant's parents were imprisoned for criminal neglect of their children, that defendant had been repeatedly beaten by his father, that while his parents were imprisoned he spent time in an abusive foster home, and that he had been returned to the custody of his abusive parents upon their release from prison. *Williams,* 529 U.S. at 395-96.

The jury could have viewed much of the evidence omitted by Harris's trial counsel as either mitigating or aggravating. Testimony regarding Harris's family background would reveal that despite some emotional abuse, he came from a stable family environment. In addition, evidence relating to his "good" prison record would include a description of his violent behavior while incarcerated, and taken as a whole likely would be aggravating rather than

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[9] *See Duhamel,* 955 F.2d at 966 (holding that the omission of evidence that the defendant "was moderately mentally retarded with an IQ of 56" did not result in prejudice).

mitigating. The failure to present such double-edged evidence is not prejudicial.[10]

Finally, there is overwhelming evidence of violence in Harris's background, which negates the likelihood that additional evidence would have resulted in a different outcome. *See Santellan v. Cockrell,* 271 F.3d 190, 198 (5th Cir. 2001), *cert. denied,* 122 5. Ct. 1463 (2002). In light of the overall weakness of the proposed mitigating evidence, and the fact that its introduction would have resulted in the presentation of additional evidence of Harris's past violent conduct, there is no reasonable probability that the presentation of this additional evidence would have altered the outcome of the punishment verdict. Therefore, Harris failed to demonstrate prejudice, and the district court erred in granting relief on his claim of in effective assistance.

IV.

Harris contends that his right to a fair trial was compromised by the prosecutor's improper closing arguments at the guilt-innocence phase of the trial. Specifically, Harris complains that the prosecutor improperly asked the jury to convict him on the basis of the alleged expectations and knowledge of the community. The following exchange forms the basis of his claim:

> Mr. McWilliams [the prosecutor]: Ladies and gentlemen, there's one verdict that's proper in this case. You've known it since yesterday, the verdict

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[10] *See, e.g., Ransom v. Johnson,* 126 F.3d 716, 723-24 (5th Cir. 1997); *Cockrum v. Johnson,* 119 F.3d 297, 301, 303-05 (5th Cir. 1997); *Faulder v. Johnson,* 81 F.3d 515, 5 19-20 (5th Cir. 1996).

that family and those police officers and the people of Jefferson County know is proper in this case —

Mr. Powell [defense]: Your Honor, we would object to counsel arguing that the jury should base their decision on the expectation of anybody, except on the evidence.

The Court: Sustained.

Mr. Powell: We would further request, Your Honor, that the Court instruct the jury to disregard Mr. McWilliams' statement.

The Court: So instructed.

Mr. McWilliams: It's the verdict that we know you will return, because it's justice in this case. It's not justice because I say it is. It's justice because you know it from the evidence you have here. . . . That verdict is guilt of Capital Murder.

Even if Harris is correct that the prosecutor's statements were improper, prosecutorial remarks are a sufficient ground for habeas relief only if they are so prejudicial that they render the trial fundamentally unfair."[11] Such unfairness exists

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[11] *Ortega v. McCotter*, 808 F.2d 406, 410 (5th Cir. 1987) (quoting *Whittington v. Estelle*, 704 F.2d 1418, 1421 (5th Cir. 1983)); *Kirkpatrick v. Blackburn*, 777 F.2d 272, 281(5th Cir. *1985);see also Jackson v. Johnson*, 194 F.3d 641, 653 (5th Cir. 1999) ("[T]he appropriate inquiry is . . . whether the prosecution's comments so infected the trial with unfairness that there is a

> "only if the prosecutor's remarks evince 'either persistent and pronounced misconduct or. . . the evidence was so insubstantial that (in probability) but for the remarks no conviction would have occurred.'"[12]

The prosecutor's remarks were neither repeated nor pronounced,[13] and in light of the considerable evidence of

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reasonable probability that the result would have been different if the proceeding had been conducted properly.").

[12] *Kirkpatrick*, 777 F.2d at 281 (quoting *Whittington*, 704 F.2d at 1421); *see also Menzies v. Procunier*, 743 F.2d 281, 288-89 (5th Cir. 1984) ("[A]prosecutor's improper argument will, in itself, exceed constitutional limitations in only the most 'egregious cases.'" (quoting *Houston v. Estelle, 569* F.2d 372, 382 (5th Cir. 1978)).

[13] In an attempt to create the impression that the contested remarks were repeated, Harris quotes the prosecutor in misleading fashion. Specifically, Harris quotes the prosecutor's remarks after the initial objection was sustained as follows: "It's [the verdict desired by the family, police, and the people] the verdict we know you will return . . . ." The descriptive aside inserted into this quote is misleading, because it is not apparent that the prosecutor is using the pronoun "it" to incorporate the preceding objectionable statements appealing to community expectations.

In fact, the context omitted by Harris supports a very different construction of the remarks: "It's the verdict that we know you will return, because it's justice in this case. It's not justice because I say it is. It's justice because you know it from the evidence you have here . . . . That verdict is guilt of Capital Murder." When the statement is viewed in its entirety, the most reasonable reading is that "it" refers to a verdict of guilty, not the verdict expected by the community.

guilt, there is no reasonable probability that, in their absence, the result would have been different. That is, "we cannot say that the prosecutor's remarks in this case were a crucial, critical, highly significant factor upon which the jury based its verdict of guilty." Accordingly, those statements did not render Harris's trial fundamentally unfair.

V.

Harris contends that he was deprived of a fair sentencing determination by the introduction of evidence concerning a crime for which he had been indicted but acquitted. During the sentencing phase, the state introduced evidence that Harris had been charged with burglary, robbery, attempted robbery, and kidnaping. He eventually was acquitted of kidnaping and argues that the introduction of this evidence was contrary to the collateral estoppel aspect of double jeopardy and thus constituted a violation of his due process rights.

The introduction of evidence of extraneous offenses of which the defendant has been acquitted is consistent with due process. *Vega v. Johnson,* 149 F.3d 354 (5th Cir. 1998). Although due process requires the application of collateral estoppel, *Ashe v. Swenson,* 397 U.S. 436 (1970), that doctrine "does not preclude [the state] from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof," *Dowling v. United States,* 493 U.S. 342, 349 (1990).

Because "extraneous offenses offered at the punishment phase of a capital trial need not be proven beyond a reasonable doubt," *Vega,* 149 F.3d at 359, the relevant standard of proof necessarily was lower than that at Harris's criminal trial for kidnaping. Collateral estoppel therefore did

not preclude the introduction of evidence pertaining to these charges, and Harris's due process rights were not violated. *See Vega,* 149 F.3d at 359.

In summary, we REVERSE the grant of habeas relief, AFFIRM the denial of all remaining claims, and RENDER judgment in favor of the state.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-41395

D.C. Docket No. 1:92-CV-167

U.S. COURT OF APPEALS
FILED
NOV 18 2002
CHARLES R. FULBRUGE III
CLERK

DAVID RAY HARRIS

Petitioner – Appellee-Cross-Appellant

v.

JANIE COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION

Respondent – Appellant-Cross-Appellant

FILED
US. DISTRICT COURT
02 DEC 30 PM 2:29
TX EASTERN – BEAUMONT
By /s/

Appeals from the United States District Court for the Eastern District of Texas, Beaumont.

Before JOLLY, SMITH, and EMILIO M. GARZA, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed in part, reversed in part, and rendered.

ISSUED AS MANDATE: DEC 24 2002

A true copy
Test
Clerk, U. S. Court of Appeals, Fifth Circuit
By: /s/
Deputy
New Orleans, Louisiana
DEC 24 2002

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-41395

U.S. COURT OF APPEALS
FILED
DEC 16 2002
CHARLES R. FULBRUGE III
CLERK

DAVID RAY HARRIS

Petitioner – Appellee-Cross-Appellant

v.

JANIE COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION

Respondent – Appellant-Cross-Appellant

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Appeals from the United States District Court for the Eastern District of Texas, Beaumont

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ON PETITION FOR REHEARING AND REHEARING EN BANC

(opinion 11/18/02, 5 Cir., _____, _____ F.3d _____)

Before JOLLY, SMITH, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. and 5TH CIR. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/
United States Circuit Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

FILED – CLERK
US. DISTRICT COURT
01 SEP 27 PM 2:26
TX EASTERN – BEAUMONT
By /s/

DAVID RAY HARRIS, Petitioner,	§	
	§	C.A. No. 1 :92-CV-167
vs.		
	§	Judge William Wayne Justice
GARY JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division, Respondent.	§ § §	

ORDER AND JUDGMENT

This matter came before the Court on the June 25, 2001, Report and Recommendation of the Honorable Wendell C. Radford, United States Magistrate Judge, to grant in part Petitioner David Ray Harris' petition for a writ of *habeas corpus*. The Court has entered a Memorandum Opinion explaining the reasons for its decision. The Recommendation of the United States Magistrate Judge shall be, and is hereby,

ACCEPTED by the Court. Respondent's Motion for Summary Judgment shall be, and is hereby, **GRANTED IN PART** and **DENIED IN PART.** It shall be, and is hereby,

ADJUDGED that the Petition for a writ of *habeas corpus* is **GRANTED IN PART**. It is further

ORDERED that a writ of *habeas corpus* issue to Respondent Director of the Texas Department of Criminal Justice, Institutional Division, directing him to release Petitioner from custody unless the State of Texas, within 180 days from the date of entry of this Order and Judgment, either reforms Petitioner's sentence from death to life imprisonment, or vacates Petitioner's death sentence and commences new proceedings to determine the appropriate punishment for Petitioner's capital murder conviction.

SIGNED this 25th day of September, 2001.

William Wayne Justice
Senior United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

FILED – CLERK
US. DISTRICT COURT
01 JUN 25 PM 2:56
TX EASTERN – BEAUMONT
By /s/

DAVID RAY HARRIS,	§	
vs.	§	No. 1 :92-CV-167
DIRECTOR, TDCJ-ID	§	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Petitioner David Ray Harris, ("Harris") an inmate confined to the Texas Department of Criminal Justice, Institutional Division, filed a petition for a writ *of habeas corpus* pursuant to 28 U.S.C. § 2254. Harris challenged his capital murder conviction and the death sentence imposed in the Criminal District Court of Jefferson County, Texas in cause No. 46204, styled *The State of Texas v. David Ray Harris.*

On December 6, 1999, this case was referred pursuant to 28 U.S.C. § 636(b)(l) (B) the Amended Order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrate Judges for proposed findings and recommendations for the disposition of the case. The Court gave the parties the opportunity to submit additional pleadings before submitting its proposed findings and recommended disposition.

INTRODUCTION

On September 1, 1985, Harris broke into an apartment rented by Mark Mays. He ordered Mays into the bathroom at gunpoint and kidnaped Mays' girlfriend Roxanne Lockard. After Harris left, Mays escaped from the bathroom, armed himself and pursued Harris. A gun battle ensued in the parking lot, and Harris, who sustained at least two wounds himself, eventually killed Mays. Powder burns on Mays' head indicated that he was shot once from between a distance of one to two feet. Harris then fled the scene alone. Four days later, Harris was arrested for driving while intoxicated. When the arresting officer realized that Harris was wounded and had a stolen pistol under his seat, the officer arranged for Harris' wounds to be treated and questioned him about the theft of the gun and his wounds. During this questioning, detectives investigating the Mays killing were brought in to question Harris. Eventually Harris admitted his involvement in the kidnaping and shooting.

Harris was convicted of capital murder under Texas Penal Code §19.03 (a) (2), the murder of Mays having been committed in the course of committing another felony, the kidnaping of Lockard. In the punishment phase of he trial, the prosecution offered evidence of Harris' extensive criminal history, as well as testimony of psychiatrist who opined that, based upon that history and the facts of the current offense, there was a substantial risk that Harris would commit future violent crimes. Harris presented testimony from both his alcohol counselor and his parole officer that there was a direct relationship between his use of alcohol and his criminal behavior, and that he was a nice person when not drinking. His parole officer further testified that she did not believe that the death penalty was appropriate in his case.

The jury answered affirmatively the three special issues necessary to impose the death penalty pursuant to Texas Code of Criminal Procedure art. 37.071, finding that Harris' conduct that caused Mays' death was committed deliberately and with the intention that death would result, that there is a probability that Harris would commit criminal acts of violence that would constitute a continuing threat to society, and that Harris' conduct in killing Mays was unreasonable in response to the provocation, if any, by Mays. On April 28, 1985, the trial judge sentenced Harris to death.

Harris' appeal was denied by Texas Court of Criminal Appeals on September 13, 1989. *Harris v. State,* 784 S.W.2d 5 (Tex. Crim. App. 1989), *cert.. denied,* 494 U.S. 1090 (1990). His state application for a writ of *habeas corpus* was denied on December 18, 1991. *Ex parte Harris,* 825 S.W.2d 120 (Tex. Crim. App. 1991). He filed his federal petition on April 28, 1992.

PROPOSED FINDINGS

Harris raised eight claims in his federal petition:

1. The jury was precluded from considering mitigating evidence in the record.

2. The jury was precluded from considering mitigating evidence not in the record.

3. The trial judge denied his instruction on voluntary manslaughter.

4. The prosecutor made improper closing argument.

5. His confession was involuntary.

6. The terms in the three special issues propounded to the jury at the punishment phase of his trial were not properly defined.

7. His trial and appellate counsel provided ineffective assistance.

8. The admission of evidence of his other offenses and of psychiatric testimony regarding his future dangerousness denied him a fair trial.

1. Whether the jury was precluded from considering mitigating evidence in the record

Harris' first claim is that Tex. Code Crim. Pro. art. 37.071, which limits the jury's role at the punishment phase of the trial to deciding three questions in order to determine whether to impose the death penalty, did not allow it to adequately consider and weigh the mitigating factors he presented, which included his youth, his intoxication, both at the time of the crime and during his previous criminal behavior, his cooperation with the police, his remorse, the fact that the victim had shot first, and the fact that he was alcoholic and drug dependent but was attending counseling.

In *Penry v. Lynaugh,* 492 U.S. 302 (1989), the United States Supreme Court held that art. 37.071 did not allow the jury the opportunity to adequately consider and weigh evidence that a defendant was mentally retarded. The Fifth Circuit has since held, however, that in contrast to mental retardation, a jury does have the opportunity to consider and to weigh evidence of a defendant's intoxication, alcoholism and remorse when it determines whether the defendant acted deliberately and with the intention that death would result from his actions. *See e.g. James v. Collins,* 987 F.2d 1116, 1121 (5th Cir.), *cert. denied,* 509 U.S. 947 (1993). It has also held that a jury has the opportunity to consider and

weigh evidence of a defendant's youth when it determines whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society, *see Graham v. Collins,* 950 F.2d 1009, 1029 (5th Cir. 1992), *aff'd.,* 506 U.S. 461 (1993), as well as to weigh evidence of a defendant's cooperation with the authorities in the context of that same issue. *See Wilkerson v.* Collins, 950 F.2d 1054, 1062 (5th Cir. 1992), *cert. denied,* 509 U.S. 921 (1993).

The Fifth Circuit has not addressed whether under art. 37.071 a jury has the opportunity to give effect to Harris' claim that Mays shot first. The Court finds that the jury had an adequate opportunity to assess Harris' evidence that Mays shot first in the context of the third question: Whether Harris' killing Mays was a reasonable response to provocation by Mays. Because the Court concludes that the jury did have the opportunity to consider the mitigating evidence in the context of the three questions propounded pursuant to art. 37.071, it recommends that Harris' first claim be denied.

2. Whether the jury was prevented from considering mitigating evidence not in the record

Harris' second claim is that the jury was precluded from considering as mitigating evidence that he suffered extensive emotional, psychological and sexual abuse as a child. Harris produced such evidence in support of his petition for *habeas corpus,* but he did not attempt to introduce it at trial. The Fifth Circuit has repeatedly held that claims that article 37.071 precludes the jury from adequately considering and weighing mitigating evidence may not be maintained if the mitigating evidence is not tendered at trial. *See e.g. West v. Johnson,* 92 F.3d 1385, 1405 (5th Cir. 1996), cert. *denied,*

520 U.S. 1242 (1997). Binding precedent compels the Court to recommend that this claim be denied.

3. Whether the trial court erred in refusing to give the defense's proffered jury instruction on voluntary manslaughter.

Harris' third claim is that the trial judge wrongfully refused his proffered jury instruction on voluntary manslaughter. The trial court instead gave the prosecution's proffered voluntary manslaughter instruction, which incorrectly placed upon the defendant the burden of proof of whether Harris killed Mays while under the immediate influence of sudden passion based upon adequate cause. *See Cobarrubio v. State*, 675 S.W.2d 749, 751 (Tex. Crim. App. 1983), *overruled in part on other grounds, Lawrence v. State*, 700 S.W.2d 208 (Tex. Crim. App. 1985).

Under Texas law, when a victim attempts to prevent the defendant from committing a felony, the victim's actions cannot constitute adequate cause to support a jury instruction on manslaughter. *Linecum v. State*, 736 S.W.2d 673, 679 (Tex. Crim. App. 1987), *cert. denied*, 486 U.S. 1061 (1988). The Texas Court of Criminal Appeals held that under *Linecum*, Harris was not entitled to a jury instruction on manslaughter at all. Accordingly, whether the instruction he did receive was incorrect is irrelevant. *Harris v. State*, 784 S.W.2d at 9-10.

Harris contends that the Texas Court of Criminal Appeals reached a different result on indistinguishable facts in *Havard v. State*, 800 S.W.2d 195 (Tex. Crim. App. 1990), and that the inconsistency between these decisions demonstrates that that court was biased against him. However, the cases are distinguishable. In *Havard*, the defendant was provoked by his ex-wife before engaging in felonious conduct, while in the present case, Harris' broke

into Mays' apartment and kidnapped Lockard without being provoked by either of them. The Court agrees' with the Texas Court of Criminal Appeals that the trial court was not required to give a manslaughter instruction in this case, and therefore, its failure to give a correct instruction did not deprive Harris of a fair trial.[1] The Court recommends this claim be denied.

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[1] Even if the Court determined that a voluntary manslaughter instruction was required, it would not grant relief on this claim. In *Mayabb v. Johnson,* 168 F.3d 863, 867-68 (5'" Cir.), *cert.. denied,* __ U.S __, 120 S.Ct 409 (1999), the Fifth Circuit held that in order to obtain *habeas corpus* relief because a trial court gave a voluntary manslaughter instruction which incorrectly placed the burden of proof on the defendant, there must be more than a mere reasonable possibility that the error contributed to the verdict; rather, the error must have had a substantial effect or influence in determining the verdict. Given the confidentiality of jury deliberations, it is difficult in all but the most extreme cases to determine with confidence whether an instruction which incorrectly allocates the burden of proof had a substantial effect or influence on a jury's final verdict.

In this case, however, the evidence suggests it did not. The third special issue under art. 37.071 is whether the defendant's actions in killing the decedent were an unreasonable response to the provocation, if any, of the decedent. This is similar to the elements of voluntary manslaughter, which are whether the defendant acted under the immediate influence of sudden passion based upon adequate cause. *See* Texas Penal Code Sec. 19.04. In the present case, the jury reached consistent results on the two issues. Because the jury was aware at the punishment phase that the burden of proof rested with the state when it decided the third question under art. 37.071, and it decided that question consistently with its decision on the voluntary manslaughter issue, it does not appear that the jury's being misinformed as to who had the burden of proof on the manslaughter issue substantially affected or influenced their verdict on that issue.

4. Whether the prosecutor's closing argument denied Harris a fair trial

Harris' fourth claim is that the prosecution's improper statement during its closing argument denied him a fair trial. The prosecutor stated: "Ladies and gentlemen, there's one verdict that's proper in this case. You've known it since yesterday, the verdict that [the] family and those police officers and the people of Jefferson County know is proper in this case-"Harris' counsel objected and the Court sustained the objection. Defense counsel then asked the court to instruct the jury to disregard the statement and the court replied: "So instructed." The prosecutor then finished his argument by stating: " It's the verdict we know you will return, because it's justice in this case... That verdict is capital murder."

Under state law, a jury argument which refers to the expectations or demands of the community for a particular result constitutes reversible error, even if the jury is instructed to disregard the remark. *See* Harris, 784 S.W.2d at 12. To obtain relief in a federal *habeas corpus* case, however, a petitioner must show either that the state prosecutor's misconduct was persistent or pronounced or that the evidence of guilt was so insubstantial that he would not have been convicted but for the improper remarks. *Jones v. Butler,* 864 F.2d 348, 356 (5th Cir. 1988), *cert. denied,* 490 U.S. 1075 (1989). In the present case, the passage quoted above does not establish persistent or pronounced misconduct. In addition, there was substantial evidence of Harris' guilt, including his own testimony, the testimony of Lockard and the testimony of the detectives. Because Harris' contentions establish neither of the alternative prongs

of the *Butler* test, the Court recommends that his fourth claim be denied.

5. Whether Harris' confession was involuntary

Harris' fifth claim is that his confession, was involuntary, having been procured through several unconstitutional actions by the police. Harris was arrested initially for driving while intoxicated. The police searched his vehicle and found a gun under the driver's seat. After determining that the gun was stolen, they informed Harris that he was also under arrest for burglary. The officers called for paramedics who treated Harris' wounds. Harris stated that he wanted to talk with Kitrell, the police chief, whom he knew and trusted. At the station, the officers learned about Mays' killing and realized that Harris' gunshot wounds and the description of his vehicle were consistent with what the police knew about that crime. Kitrell told Harris that he believed Harris was involved in Mays' death as well. When Harris expressed fear of being killed in prison, the police chief said in essence that he could not do much to help him, but that he would try to make the right people aware of his situation. Harris then waived his rights under Miranda and gave an oral and later a written confession to abducting Lockard and killing Mays. The police then took Harris before a magistrate judge for arraignment.

Harris makes four arguments why his confession should be suppressed. He contends first that it is "fruit of the poisonous tree" in that the search of his vehicle was unconstitutional. Unless a petitioner can establish that the State did not provide a full and fair opportunity to litigate a fourth amendment claim, however, such a claim is not cognizable in federal *habeas corpus*. *Stone v. Powell*, 428

U.S. 465, 494-95 (1975). Harris makes no such allegations about the State court suppression hearing in his case.

Harris next contends that his confession should be suppressed because the combination of his intoxication and his bullet wounds rendered him incapable of validly waiving his *Miranda* rights. Considering that his intoxication would decrease over time and that his statements were made several hours after his arrest, and considering that his statements were made after he had received medical treatment for his wounds, the Court sees no reason to disturb the State court's determination that he was capable of knowingly and voluntarily waiving those rights.

Harris contends third that Kitrell used Harris' trust in him, as well as the promise that he would help him avoid being killed in prison, as tools to coerce his confession. Kitrell admits that he tried to play on Harris' trust, and the record shows that he offered to talk with people in the prison system on Harris behalf. A confession is considered involuntary if it results from a promise by a police officer of a benefit that the officer had the power to grant or to withhold. *Hawkins v. Lynaugh,* 844 F.2d 1132, 1140 (5th Cir. 1988), *cert. denied,* 488 U.S. 900 (1988).

In *Hawkins,* the court held that a promise during questioning to try to help obtain psychiatric help or counseling for a suspect did not constitute a promise or a benefit that the officer had the power to grant or to withhold. *Hawkins* implies that a promise to request a benefit is not the same as a promise to provide a benefit. The statement by Kitrell in the present case that he would inform the people in the prison system of petitioner's situation was essentially a promise to request added protection. Kitrell's statement thus seems indistinguishable from the statement found unobjectionable in *Hawkins.* Further, the Fifth Circuit held

that attempts to gain psychological advantage over a suspect, such as using a sympathetic interrogator, or even using trickery, do not render a confession involuntary unless they exert psychological pressure strong enough to overbear the will of a mature, experienced man. *Id.* Upon reviewing the above facts, as well as the fact that Harris had an extensive criminal record and thus had had numerous dealings with the police, the Court does not find sufficient reason to overturn the State court finding that Harris' confession was voluntary.

Finally, Harris contends that his confession should be suppressed because he was not taken before a magistrate judge "without unnecessary delay" in violation of state law. The Fifth Circuit addressed a similar claim in *West v. Johnson,* 92 F.3d 1385 (5th Cir. 1996), *cert. denied,* 520 U.S. 1242 (1997) and found that violation of state statutory requirements was not enough to establish a federal *habeas corpus* claim; instead, the petitioner must show that the delay in taking him before a magistrate was unreasonable. In that case, the court held that a delay of 30 hours did not state a claim for relief, because delays of up to 48 hours are presumed reasonable. *Id.* at 1405. Because Harris' appearance before a magistrate occurred within 18 hours of his arrest, the Court finds that no federal constitutional violation occurred. Finding no merit in Harris' four arguments about the propriety of his confession, the Court recommends that his fifth claim be denied.

6. Whether the special punishment issues were unconstitutionally vague

Harris' sixth claim is that the three questions propounded to the jury at the sentencing phase of the trial are unconstitutionally vague because certain terms were not defined. The Fifth Circuit rejected this claim in *James v. Collins,* 987 F.2d 1116, 1119-20 (5th Cir.), *cert. denied,* 509

U.S. 947 (1993). Accordingly, the Court recommends that this claim be denied.

7. Whether trial and appellate counsel provided ineffective assistance

Harris' seventh claim is that his counsel provided ineffective assistance, both at trial and on appeal. In *Strickland v. Washington,* 466 U.S. 668, 686 (1984), the United States Supreme Court established a two-part test for determining ineffective assistance of counsel claims: Counsel's performance must fall below the standard of conduct expected of a reasonable attorney under the circumstances, and second, had counsel acted properly, there must be a reasonable probability that the result in the proceeding would have been different. Petitioner must establish both of these elements; if the Court determines that he cannot establish one of them, it is unnecessary to consider whether he can establish the other. The Court indulges a strong presumption that counsel's representation was effective. 466 U.S. at 688.

a. at trial

In the present case, the trial judge conducted a hearing by affidavit on Harris' claims and determined that counsel was not constitutionally ineffective. The factual predicate to this determination is presumed correct. *Pratt v. Cain*, 142 F.3d 226, 230 (5th Cir. 1998).

Harris argues that the State court factual findings are not entitled to the presumption of correctness because the fact finding procedure employed by the State court was not adequate to afford a full and fair hearing, the material facts were not adequately developed at the State court hearing, he did not receive a full, fair and adequate hearing in the State court proceeding and he was denied due process of law in the

State court proceeding. His sole support for the above allegations is that the judges on the Texas Court of Criminal Appeals and the trial judge were not impartial and were in fact biased against him. As evidence of that bias, he points to the footnotes in *Harris v. State,* 784 S.W.2d 5 (Tex. Crim. App. 1989), *cert. denied,* 494 U.S. 1090 (1990) and *Ex parte Adams,* 768 S.W.2d 281 (Tex. Crim. App. 1989), both of which imply that Harris was guilty of a different murder with which he was never charged. He also points out that two of the trial judge's findings of fact in his state habeas corpus case were sarcastic in tone.

Harris' argument is flawed for two reasons. First, because the trial judge, not the Court of Appeals, conducts the fact-finding hearing, any alleged bias on the part of the Texas Court of Criminal Appeals is simply irrelevant. Second, that two of the trial judge's findings of fact and conclusions of law contained sarcastic remarks is, while unfortunate, insufficient in and of itself to sustain a charge of bias. *Compare Liteky v. United States,* 510 U.S. 540, 555 (1994) (judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality charge). To obtain relief by way of federal *habeas corpus,* therefore, Harris bears the burden of rebutting the presumptions of effectiveness and the presumption of correctness of the State court's factual findings by convincing evidence. See 28 U.S.C. §2254(d)(8).

Harris contends in his petition that there were fourteen instances in which his trial counsel was ineffective. He first contends counsel should have challenged the inventory search of his truck. A direct challenge to the search is foreclosed under *Stone v. Powell.* See claim 5 above. The merits of this claim still must be discussed in order to

determine whether, had counsel raised this issue, the result in the case would have been different.

Harris contends that the investigation which resulted in his confession was a product of his arrest for burglary, which occurred after a gun was found under the seat of his car, and that the "inventory search" justification for finding the gun is invalid under *South Dakota v. Opperman,* 428 U.S. 364 (1976). There are two problems with this argument. Assuming *arguendo* that Harris is correct about *Opperman,* regardless of the officer's stated rationale for the search, a police officer may conduct a contemporaneous search of the passenger compartment of a vehicle when he effects a custodial arrest of the driver. *New York v. Belton,* 453 U.S. 454, 460 (1981). Accordingly, the search of Harris' truck was justified by the "search incident to arrest" exception to the warrant requirement, even if it was not justified by the "inventory search" exception.

Moreover, even if the inventory search and the arrest for burglary were invalid, Harris was already under arrest for driving while intoxicated; there is no indication that he would not have been taken to jail and questioned further about his bullet wounds even if the police had not found the stolen gun. Because a challenge to the arrest would have failed for both of these reasons, it was not deficient performance for counsel to have forgone raising this claim, and, had counsel raised these claims at trial, there is not a reasonable probability that the result in the case would have been different. This sub-claim fails to meet either prong of the *Strickland* test.

Harris contends next that counsel's motions to suppress his confession contained no citations to legal authority. Counsel contended that it was standard practice to file boilerplate motions and to wait to discuss specifics until the

hearing on the motion. Assuming *arguendo* that trial counsel's performance was deficient, the Court nevertheless finds that a better motion would not have made a difference in the outcome of the case, because, as explained above, the confession was not unconstitutionally obtained. Accordingly, this sub-claim does not meet the second element of the *Strickland* test.

Harris next claims that his trial counsel's motion to suppress Lockard's initial identification of him was deficient in that it did not address the fact that her testimony was enhanced through hypnosis, and that it did not argue that Lockard's identification of him resulted from an impermissibly suggestive line-up. Because the Court has already proposed finding that Harris' confession was not obtained in violation of his constitutional rights, and because his confession precluded the need for an in-court identification, the Court proposes finding that there is not a reasonable probability that, had the motion contained the missing contentions, the result in Harris' trial would be different. This sub-claim fails to meet the second prong of the *Strickland* test.

Harris next contends that counsel should have investigated his history of drug and alcohol abuse, below-average intelligence, possible brain damage, intoxication at the time he committed the crime and effect of being wounded in order to demonstrate that he could not have formed the requisite intent to commit murder. Counsel testified in his affidavit that, as a matter of strategy, he opted to pursue only a defense of attempting to demonstrate that Harris' actions constituted voluntary manslaughter.

Hands contends that the first strategy would have had a better chance of success than the strategy that was actually employed. Perhaps he is correct, but that is not the test. If

counsel chooses a reasonable defense strategy after thoroughly researching the alternatives, his not pursuing those other alternatives does not constitute deficient performance for purposes of the *Strickland* test. *See Pratt*, 142 F.3d at 231. The trial court found that counsel did extensive research and investigation. Thus, the inquiry for purposes of federal *habeas corpus* review is not whether another strategy might have worked better, but rather whether the strategy employed was unreasonable.

As discussed above, the Texas Court of Criminal Appeals held that on the facts of the case, Harris was not entitled to a jury instruction on voluntary manslaughter, citing *Linecum* This would suggest that counsel's strategy was unreasonable; however, *Linecum* was decided after the trial in this case, and, indeed, the trial judge did give a voluntary manslaughter instruction to the jury in Harris' trial, albeit an incorrectly formulated one. Because Harris' counsel was successful in getting his defense to the jury, this Court cannot find that his counsel's strategy was unreasonable. Accordingly, this sub-claim does not meet the first prong of the *Strickland* test.

Harris next contends that counsel failed to follow up on the results of a polygraph examination given to Lockard. Counsel disputed this contention in his affidavit. Because the results of the polygraph examination were not admissible-for any purpose, Harris cannot demonstrate that, had counsel conducted further investigation, there is a reasonable probability that the result of his trial would have been different. This sub-claim does not meet the second prong of the *Strickland* test.

Harris contends that counsel should have objected to Lockard's testimony about his state of mind; specifically, that he did not seem to be in a hurry when he got into his

truck. Harris has not demonstrated that there is a reasonable probability that such an objection would have been sustained. Further, he has not demonstrated that, even had it been sustained, there was a reasonable probability that the result in his trial would have been different. This sub-claim does not meet the second prong of the *Strickland* test.

Harris next contends that counsel should have objected to the prosecution's closing argument as going outside of the record. However, counsel objected to the argument on other grounds, the objection was sustained, and the jury was instructed to disregard the argument. See claim 4 above. Harris has not demonstrated that, had counsel objected on a different basis, there is a reasonable probability that the result of his trial would have been different. This sub-claim does not meet the second prong of the *Strickland* test.

Harris contends that counsel used the wrong basis to challenge venirepersons LaFleur and Hernandez. Neither of them served on the jury, and Harris has not established that there was a reasonable probability that, had counsel offered proper challenges, the result in his case would have been different. This sub-claim does not meet the second prong of *Strickland* test.

Harris next contends that his trial counsel should have moved to suppress two statements he made during interrogation: that he had fired the last shot at Mays in order to "finish him off" and that he entered Mays' apartment because he "was out looking for a piece." Harris contends that these statements were inflammatory, prejudicial and inadmissable under state law.

Assuming *arguendo* that counsel's failure to object to the admissibility of these statements was unreasonable under the circumstances, *Strickland* requires the Court to determine whether there is a reasonable probability that, had counsel

objected and had the statements been excluded, the result in the trial would have been different. As to Harris' first statement, the testimony of the pathologist that the fatal wound to Mays' head was fired from a distance of one to two feet strongly supports an inference that the shot was fired to "finish him off." Similarly, Lockard's and Harris' testimony were consistent that he abducted her from Mays' apartment at gunpoint. Their testimony strongly support an inference that he "was out looking for a piece" when he entered the apartment.[2] Because this evidence strongly supported the same inferences as to what Harris was thinking as what he described in his oral statement, there is not a reasonable probability that excluding those oral statements would have caused the jury to reach a different result. This claim does not meet the second prong of *Strickland*

Harris next contends that his trial counsel was ineffective for failing to hire an expert witness, and in failing to adequately prepare to cross-examine the state's expert witnesses, on the issue of how far away Harris was from Mays when he fired the final shot. Counsel testified that before the trial, he had interviewed one of the two pathologists that were eventually called by the State, and, based on that interview, believed that the testimony of that witness would cast some doubt on the testimony of the other pathologist, so counsel did not think it necessary to obtain a defense witness. Counsel testified that he was surprised at

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[2] Harris testified that he entered the apartment in order to commit a robbery, but abducted Lockard in order to escape safely from the apartment. Considering that locking the young woman in the bathroom with her boyfriend would have been a much safer way to make his escape than by abducting her, Harris' actions appear more likely a product of the state of mind he described in his oral statements to the police than of the state of mind he expressed in his trial testimony.

trial when the witness testified differently from what he had told counsel during the interview. Because counsel did not depose the witness, he was not able to impeach his trial testimony. When surprised at trial, counsel did not ask for a continuance to obtain an expert, believing that the Judge would not grant the request.

Assuming *arguendo* that these decisions constituted deficient performance, the second prong of *Strickland* test requires the Court to analyze whether, had trial counsel requested a recess in order to obtain an expert witness, the result in the case would have been different. The Court has considered three scenarios. In the first scenario, the Court considered the likelihood that the request would be denied by the trial court and the likelihood that an appeal would not have been successful because the denial would have been reviewed under an abuse of discretion standard. In the second scenario, the Court assumed that the trial court granted the request for a continuance and then considered the likelihood that counsel might not have been able to obtain an expert witness who would testify that the shot was fired from more than two feet away, either because counsel could not locate a witness within the necessarily brief recess which the trial court might have granted, or because in fact the shot was fired from within two feet or less of Mays' head. In the third scenario, the Court assumed that the trial court granted the request and the defense located an expert who gave beneficial testimony on the issue. The Court then considered the possibility that the jury might not have believed the expert, or, in the alternative, the likelihood that even though they believed him, the fact that the final shot was fired from more than two feet away is not a defense to guilt and would be of debatable value as mitigating evidence. After weighing these factors and considering all three scenarios, the Court proposes finding that there is not a reasonable .probability that, had trial counsel requested a continuance in

order to obtain an expert witness on this issue, the result in the case would have been different. This sub-claim does not meet the second prong of the *Strickland* test.

Harris next contended that trial counsel provided confidential information about him to the producers of a movie about another murder. He points out that the theme of that movie was that he was the actual killer and that an innocent man was sentenced to death for that murder. He contends that the release of the movie caused unfavorable publicity which caused the Texas Court of Appeals to be biased against him. He contends that, although he executed a release, counsel produced information beyond the scope of that release, and that trial counsel should have dissuaded him from cooperating in any fashion with the film's producer.

Assuming *arguendo* that counsel's actions were unreasonable, Harris' claim fails because he cannot show that either the movie or the publicity resulting from it caused the alleged bias in the Texas Court of Criminal Appeals. To support his claim of bias, Harris refers to footnotes in two published opinions which discuss his role in the case about which the movie was made. These footnotes, however, discussed facts which were contained in the records of the cases themselves and which were relevant to the issues in those cases; there is no indication that the judges of the Court of Criminal Appeals were influenced by the movie or by the publicity it caused.

Moreover, even if the judges were influenced by the movie, Harris does not contend that the background information supplied by counsel was responsible for the judges' bias. Accordingly, there is not a reasonable probability that, had Harris' trial counsel not given information about his background to the movie producers,

the result on his appeal would have been different. This sub-claim fails to meet the second prong of *Strickland* test.

Harris next contends that trial counsel should have objected, at the punishment phase of his trial, to the introduction of "pen packets" that had not been properly authenticated as required by *Dingier v. State*, 768 S.W.2d 305 (Tex. Crim. App. 1989). The Court finds *Dingier* distinguishable, as it dealt with the admission of prior convictions under the Texas habitual offender statute. The standards for admissibility of evidence of crimes in the punishment phase of a capital case - where the result is not mandated by the admission of evidence of prior convictions - need not be so rigid.[3] Because *Dingier* does not establish the standard of admissibility for evidence of prior convictions in the punishment phase of a capital trial, counsel's failure to object to the evidence presented in Harris' case is not deficient performance. This sub-claim fails to meet the first prong of the *Strickland* test.

Harris next contends that counsel failed to object to the prosecution's introduction of unadjudicated offenses he allegedly committed. Because such evidence is admissible, see claim 8 below, counsel's failure to object did not constitute deficient performance; furthermore, because the objection, if made, would have been denied, there is not a reasonable probability that the result in the case would have been different. This sub-claim fails to meet either prong of the *Strickland* test.

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[3] For example, as explained in claim 8, evidence of both unadjudicated offenses and even of crimes for which the defendant has been acquitted are admissible in the sentencing phase of capital cases. Neither could be used under the State habitual offender statute.

Harris next contends that counsel should have called a witness who would have testified that he and Harris were drinking heavily until 6:00 p.m. the evening of the crime. He contends that this testimony would have better established Harris' intoxication than the testimony of the alcohol counselor which counsel employed. Because the crime occurred more than six hours after the witness last saw Harris, the Court finds that counsel's decision not to call this witness was not unreasonable. This sub-claim fails to meet the first prong of the *Strickland* test. Harris next contends that trial counsel failed to properly investigate, and failed to present, all of the mitigating evidence available at the punishment phase of his trial. Harris filed an affidavit in support of this claim with his State *habeas corpus* application. In that affidavit, he stated:

> Counsel never indicated or discussed with me the importance of presenting mitigating evidence at the penalty phase and did not explain to me the general types of evidence that could be submitted or, beyond a brief conversation about testimony from my family, any specific evidence that could be submitted in my case.
>
> * * * * * *
>
> If my trial counsel had explained to me the importance of mitigating evidence, I certainly would have instructed them to interview my family members and to elicit testimony from them. I also would have explained to them the facts concerning my background that are set forth in detail in the habeas petition filed on my behalf.

In his state petition, Harris claimed that mitigating evidence was available from both family and non-family sources about his suffering several traumatic childhood

experiences. He also claimed that evidence of his good character traits was available and that both of these types of evidence should have been introduced, but were not.

The trial judge conducted a "paper" hearing on Harris' claim, *see Perillo v. Johnson*, 79 F.3d 441, 446 (5th Cir. 1996), allowing counsel to respond to the allegations in the petition by affidavit. In response to the allegations of failing to present mitigating evidence, lead trial counsel stated in his affidavit:

> These allegations deal with the failure to present mitigating evidence. I will state that I did extensive investigation into David's background and history. I obtained through the family boxes of information and records of David's background and history. I did interview the family members. The decision as to the mitigation evidence to be presented was made by the client, contrary to counsel's advise(sic).

Co-counsel's response was similar: .

> The mitigating evidence which was presented on behalf of David Ray Harris was presented with the consent of the defendant. My recollection is that persons whom we would like to call on behalf of the defendant, and many facts which we would have liked to have delved into were ruled out by the defendant . . .

The State Court denied the petition, finding that:

> Trial counsel did extensive research and investigation to discover favorable mitigating evidence. All matters were fully and completely conveyed to and discussed with Petitioner. The decision as to what evidence to produce or not

> present at trial was made intentionally, knowingly and voluntarily by Petitioner.

As discussed above, under 28 U.S.C. §2254 (e)(1), this finding is entitled to a presumption of correctness. Normally, the evidence upon which an applicant would challenge a State court fact finding must have been presented to the State court. Under 28 U.S.C. §2254 (e)(2)(A)(ii), however, the federal court may conduct an evidentiary hearing in order to develop evidence if the claim relies on a factual predicate that could not have been previously discovered through the exercise of due diligence. This Court conducted such a hearing. At that hearing, Harris' trial counsel's testimony contradicted the testimony in his affidavit, and also contradicted what the trial judge found as fact:

> Q. David never instructed you not to investigate potential evidence that could be available for his punishment phase from sources other than his family, did he?
>
> A. In essence, yes.
>
> Q. What do you mean, in essence? He either did or he didn't.
>
> A. David didn't want to talk about the punishment phase. His position all along was, he wanted to win at guilt-innocence. That if he was convicted of capital murder, he'd rather get the death penalty than a life sentence. He didn't want to spend the rest of his life in prison. It was an issue we argued over. It wasn't a realistic issue and it was an issue I felt like at some point in the future, he would regret.

Q. And is it your position that once David said, "I don't want to focus on the punishment phase. I want to focus on the guilt-innocence phase," that you, as an effective competent advocate on his behalf, just throw up your hands and walk away from dealing with the punishment phase? .

A. I wouldn't think that at all. I think it limits how you try your case and it limits where you devote your attention. But obviously, when it came to cross-examining punishment witnesses and making oral arguments, I felt like we gave it everything we had.

Q. Did you ever tell David that failing to call family members, failing to call any other witnesses at the punishment phase could, in fact, make the difference between life and death for him?

A. Would probably, in fact.

Q. And he said, "I don't want to do it," so you just marched on down the road?

A. I felt like the client certainly had a voice in how he wanted his case tried. I talked to him enough times that I felt comfortable he understood what he was deciding.

* * * * *

Q. Mr Powell, you just testified a few minutes ago that David told you he did not want his family involved in the punishment phase and he did not want further investigation done at the punishment stage because, if he was convicted, he would prefer death to life, correct?

A. Yes.

Q. Then explain to us please, why you put on Nancy Petkovsek and Evelyn Powell and why you cross-examined any of the state's witnesses at the punishment phase? Was that not in direct violation of your client's instructions?

A. Yes.

Q. So, when there were matters that you thought were sufficiently important with respect to the punishment phase, you felt free to violate your client's instructions?

A. I felt like there were things I could do without any help from David and I tried to do those. Yes, I was circumventing what he told us.

Counsel's testimony at the evidentiary hearing contradicts the State court's findings in two important respects. First, all matters were not completely and fully conveyed to Harris. Because counsel believed that Harris in essence did not want mitigating evidence presented, he did not discuss with Harris that he was investigating mitigating evidence through non-family members.

Second, the decision of what evidence to produce or not to produce at trial was not made intentionally, knowingly and voluntarily by petitioner, because counsel directly violated and circumvented what he believed to be Harris' instructions not to put on mitigating evidence, by putting on the testimony of his probation officer and his alcohol counselor.

Because trial counsel's testimony at the federal court evidentiary hearing contradicted his prior affidavit in two key respects, and because the State Court's findings were based upon counsel's affidavit, the Court proposes finding Harris has met his burden under 28 U.S.C. §2254 (e)(1) of

rebutting by convincing evidence the presumption of correctness of the state trial court's findings on his ineffective assistance of counsel claim. The Court thus reviews the claim *de novo.*

Having reviewed all of the evidence, including Harris' affidavit, the affidavits of counsel given for the state court hearing and the deposition testimony of counsel at the evidentiary hearing, the Court proposes the following findings:

While preparing for trial, counsel began to investigate possible mitigating evidence through interviewing and obtaining material from family members. When they broached the subject with Harris, he told them that he did not want his family involved in his trial at all, and that he wanted them to concentrate on the guilt-innocence phase in their preparations. Harris also said, on more than one occasion, that he preferred death to life imprisonment.

Counsel believed that Harris would regret his decision, and, in case he changed his mind, they decided to continue to prepare to put on a case in mitigation. They asked Harris to reconsider his instructions not to involve his family, but he refused. As a result of Harris' refusal, counsel completely abandoned investigating Harris' childhood. They decided not to any background information at the punishment phase of Harris' trial if he were convicted, even though they thought it would probably mean the difference between life and death. They limited their investigation and preparation to developing evidence about Harris' alchoholism and drug abuse, his recent improvement in dealing with these problems, and his good personal qualities. Counsel relied on two-non-family witnesses: his parole officer was willing to testify as to his good behavior and good qualities, and his alcohol counselor was willing to testify that he was not the

sort of person who deserved the death penalty because his criminal behavior occurred only when he was intoxicated, and he was making progress towards controlling his alcoholism. Counsel ruled out investigating or introducing psychiatric testimony because they believed that juries were not impressed by "hired gun" experts. Counsel prepared to cross-examine the state's witnesses, including the state psychiatrist who would testify as to Harris' future dangerousness, and prepared closing arguments.

As counsel expected, Harris did have a change of heart after being convicted, and he agreed to allow counsel to put on their case in mitigation. Counsel introduced the evidence they had developed. Counsel did not, however, discuss with Harris the tactical decision they made not to further investigate his background or prepare a case for mitigation based upon his background during the time Harris was still convinced that death was preferable to life imprisonment.

The initial inquiry for the Court is whether, under the circumstances, counsel's tactical decisions were reasonable. By the time Harris first instructed counsel not to call family members as witnesses, counsel had developed substantial evidence from Harris' family members about his childhood difficulties and emotional and physical traumas. Counsel believed that evidence of Harris' background and experiences "would probably" be dispositive in the mitigation phase, so their decision to drop this line of defense entirely, rather than to attempt to introduce as much of this evidence as they could through the testimony of non-family members, seems to have been based on a mistaken inference that Defendant did not want them to investigate and introduce any evidence at all about his

background, rather than simply not to involve his family in his trial.[4]

A decision to forego what counsel knows to be a critical defense, based upon mistaken assumptions, is deficient performance. Cf. *Loyd v. Whitley,* 977 F.2d 149, 158-59 (5th Cir. 1992), *cert. denied,* 508 U.S. 911 (1993) (decision not to obtain psychological analysis of defendant's sanity at time of crime, based on mistaken belief that funds were not available, is deficient performance.) While counsel is not expected to disobey Harris' direct instructions not to involve his family members in the trial, *see Amos v. Scott,* discussed in footnote 4 above, a client's refusal to allow witnesses to testify to an issue does not negate a counsel's duty to investigate that issue, it simply narrows the scope of the investigation. *See Gray v.* Lucas, 677 F.2d 1086, 1093 (5th Cir. 1982), *cert. denied,* 461 U.S. 910 (1983). In the present case, counsel should have narrowed the scope of their investigation into Harris' background to non-family member witnesses rather than abandoning the issue entirely. Indeed, regardless of Harris' instructions, evidence of Harris' background would actually be more credible if introduced through non-family members. *See Mann v. Scott,* 41 F.3d 968, 983 (5th Cir. 1994), *cert. denied,* 514 U.S. 1117 (1995). Harris' instructions not to involve his family in the trial did not render investigating and introducing such evidence

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[4] This case is factually similar to Amos *v. Scott,* 61 F.3d 333, 348 (5th Cir.), *cert.. denied,* 516 U.S. 1005 (1995), but the court in that case based its contrary decision on the following facts not present in this case: In Amos, the defendant not only told his attorneys that he didn't want his family involved in the trial, he confirmed in writing, and stated in open court to the trial judge, that he did not want any witnesses at all called at the punishment phase, and counsel put on no testimony in the punishment phase of the case.

impracticable. *Compare Ward v. Whitley*, 21 F.3d 1355, 1362-63 (5th Cir. 1994), *cert. denied* 513 U.S. 1192 (1995) (defendant cannot blame attorneys for failing to introduce toxicological evidence when he refused to cooperate with the toxicologist) The Court proposes finding that counsel's decision constituted deficient performance.[5]

Having proposed finding that this claim meets the first prong of the Strickland test, the Court analyses whether it meets the second prong of the *Strickland* test: whether there is a reasonable probability that, had counsel presented the mitigating evidence, the result in the proceeding would have been different. Harris has produced several affidavits of non-family members, and several records which establish that Harris suffered intense and consistent emotional abuse at the hands of his father, the trauma of losing his younger brother from drowning at age four, the trauma of being blamed by his father for his brother's death, below average intelligence, being ostracized at school because of rumors of a homosexual episode, being homosexually gang raped at age 13, three organic brain injuries which required

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[5] The Court's proposed facts are based on its review of the entire record. Even if the Court simply credited trial counsel's testimony in the federal *habeas* corpus evidentiary hearing, however, it would reach the same result. The Court recognizes that as a general rule, counsel cannot be found ineffective for failing to put on mitigating evidence, if the client expressly instructs them not to. See Amos *v. Scott, supra* fn. 4. As illustrated by the present case, however, if the client's instructions are ambiguous, if counsel believes that the evidence would be the difference between life and death, if counsel believes the client will have a change of heart, and if counsel deliberately disobeys and circumvents what he believes to be are his client's instructions not to offer mitigating evidence, counsel cannot insulate himself from a claim that he tried a sub-par case in mitigation by relying on the general rule.

hospitalization, and substance and alcohol abuse from an early age. They also produced records which established that although Harris' overall prison record was far from exemplary, it at least showed steady improvement.

To determine whether mitigating evidence might have made a difference in the jury's verdict at the punishment phase, the Fifth Circuit has compared the strength of the mitigating evidence with the strength of aggravating evidence. *See e.g. Duhamel v. Collins,* 955 F.2d 962, 965-66 (5th Cir. 1992). Because *Duhamel* is also a kidnaping/murder case which involved the failure to present mitigating evidence of defendant's background, it is sufficiently similar to the present case to serve as a model for comparison. In *Duhamel,* the defendant abducted, beat, raped and choked to death a nine-year old girl. He had a significant criminal record, and had assaulted a seven year-old boy in a somewhat similar manner, although there is no evidence that he seriously injured the boy.

Duhamel claimed that his counsel should have introduced mitigating evidence at the punishment phase that he suffered from moderate mental retardation, alcoholism and vagrancy, and that his father had abused his mother. The district court granted the petition, finding that the jury might have answered one of the special issues differently had it considered this evidence. The Fifth Circuit reversed, finding that the district court applied the wrong legal standard. Rather than remanding, the Court of Appeals performed the analysis *de novo* under the correct legal standard, and determined that the mitigating evidence was so outweighed by the strong evidence of guilt, the young age of the victim, the brutality of the murder, the defendant's apparent lack of remorse and his previous criminal record that, even had the mitigating evidence been presented, there was not a

reasonable probability that the result in the sentencing phase would have been different.

Comparing *Duhamel* with the present case, on the elements cited by the Court of Appeals, is instructive. As to the strength of the evidence of guilt and the defendants' previous records, the differences between Duhamel's case and Harris' case are insignificant. As to the brutality of the crime, both cases involved the abduction of a female. However, Harris abandoned the abduction after killing Mays, and did not kill Lockard despite the possibility that she could be a witness against him. As to the killing of Mays itself, the evidence is that while Harris was prepared to kill Mays if Mays did not allow him to abduct Lockard, he did not in fact shoot Mays until Mays had shot him first. Although not a legal defense, see claim 3 above, this distinction renders the killing itself less brutal than the unprovoked rape and murder in *Duhamel.* As to the age of the victim, both Harris' intended sexual assault victim, Lockard, and his murder victim, Mays, were adults, whereas Duhamel's victim was a nine-year old child. As to the issue of remorse, Harris did express remorse for killing his victim, while Duhamel did not. In summary, Harris' and Duhamel's cases were equal as to two of the five factors considered by the Fifth Circuit, but the case against Harris was weaker than the case against Duhamel as to three of the five factors.

Comparing the elements considered in mitigation, Duhamel's and Harris' IQ scores were similar, as was their alcoholism. As to childhood trauma, Duhamel sought to offer only evidence that his father abused his mother, and that he was a vagrant. Harris seeks to offer evidence that his father severely abused him emotionally throughout his childhood and adolescence, that he lost his brother at age four and was blamed by his father for his death, that he was ostracized from his classmates because of rumors of

homosexual conduct, that he was homosexually gang raped at age thirteen, that he was a substance and alcohol abuser from a young age, and that he suffered three head injuries serious enough to require hospitalization. Harris also sought to offer evidence that his prison record had substantially improved over time. In summary, as to mitigation, Harris' and Duhamel's cases are similar as to the elements of intelligence and alcoholism, but Harris' case is far stronger on the element of childhood trauma, both emotional and physical. Harris also sought to offer evidence on the issue of improving his conduct in prison, which Duhamel did not.

Comparing these cases shows that the evidence for aggravation in Harris' case was considerably weaker than the evidence in *Duhamel* and the evidence for mitigation considerably stronger, particularly considering that Harris also presented testimony from his parole officer and his alcohol counselor that intoxication was a factor in his criminal activity, that he was attempting to overcome his alcoholism, and that the death penalty was not appropriate in his case. The Fifth Circuit found that no prejudice existed based on the facts of *Duhamel,* but considering that that case was close enough that the district judge initially found prejudice,[6] and considering that this case is significantly more compelling than *Duhamel* on both aggravation and mitigation, the Court is not confident that at least one juror's decision that Harris receive death instead of life imprisonment would not have been different had this evidence been presented. *See Loyd v. Smith,* 899 F.2d 1416, 1426 (5th Cir. 1990).

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[6] The Court finds this relevant because the standard for prejudice that the district court relied upon, while incorrect, was similar to the correct legal standard. The Court used this same analysis in deciding Harris' voluntary manslaughter instruction claim. See footnote 1, above.

A recent United States Supreme Court case also supports this result. In *Williams v. Taylor,* 529 U.S. 362 (2000), the Court found a reasonable probability that the jury would have reached a different result on evidence of aggravation and mitigation arguably less favorable to the petitioner than the evidence in this case. Williams robbed and killed a man in November of 1985. In April of 1986, while in jail on an unrelated offense, Williams confessed to that crime, and to assaulting a woman who ended up in a vegetative state. In terms of damage done, the brutality of Williams' crimes was greater than the brutality of Harris' crimes. Both Williams and Harris confessed. Both expressed remorse, and the victims in both cases were adults. At the sentencing hearing, the prosecution introduced evidence of Williams' extensive criminal background, which included two auto thefts, armed robbery and burglary convictions and another violent assault committed on an elderly person after the two incidents to which Williams confessed. Harris' criminal background was similar, although Williams' background included more violence. In summary, the aggravating evidence in *Williams* was equal to the aggravating evidence in the present case on three of the five factors considered by the Fifth Circuit, and greater on the other two.

Regarding mitigating evidence, the evidence Williams' attorneys failed to produce was similar to the evidence in Harris' case. Williams' attorneys did not produce evidence of repeated physical abuse by his father and abuse in a foster home after his parents were imprisoned for criminal neglect. As in this case, Williams' attorneys did not produce evidence of his low I.Q. and education, nor of his good conduct in prison. Like Harris' prison record, Williams' prison record was mixed. Thus, except for the parental abuse being somewhat more acute in Williams' case, the mitigating evidence was quite similar. After weighing the aggravating

and mitigating factors, the Supreme Court reversed the Virginia Supreme Court's denial of Williams' *habeas* corpus petition, finding that counsel's failure to introduce this mitigating evidence "prejudiced Williams within the meaning of *Strickland*." 120 S.Ct. at 1515. The present cases's difference from *Duhamel* and its similarity to *Williams* leads the Court to propose finding that a reasonable probability exists that, had counsel in the present case presented evidence of Harris' background, the result in the punishment phase of this case would have been different. This sub-claim meets both prongs of the *Strickland* test.

b. on appeal

Harris contends that there were fourteen instances in which his appellate counsel's assistance was ineffective. The elements of an ineffectiveness claim are the same for appellate counsel as for trial counsel. *United States v. Williamson*, 183 F.3d 458, 462 (5th Cir. 1999). Accordingly, Harris' contentions about appellate counsel will also be analyzed under the *Strickland* standards.

Harris first claims that his counsel on appeal botched the presentation of the issue that the totality of the State's argument at the punishment phase denied Harris due process and a fair trial. The Texas Court of Criminal Appeals' opinion confirms that this issue was not properly presented. *See Harris*, 784 S.W.2d at 14-15 n.10. However, Harris never explains why the State's argument denied him a fair trial. Accordingly, he has not established a reasonable probability that, had appellate counsel properly presented the issue, the result in his appeal would have been different. This sub-claim does not meet the second prong of the *Strickland* test.

Harris next contends that counsel on appeal should have raised the trial court's denial of his challenge for cause of

venireperson Sowders on the basis of her friendship with one of the prosecutors. Appellate counsel testified in his affidavit that he believed that that issue did not have a likelihood of success, and so he raised instead the issue that the trial court should have granted the other challenge for cause made against her, that she misunderstood the defense's burden of proof. Because Harris has not demonstrated that had counsel raised this issue there is a reasonable probability that the result in his trial would have been different, this sub-claim fails to meet the second prong of the *Strickland* test.

Harris next claims that appellate counsel based his claim that the trial court erred in denying challenges for cause to venirepersons Hernandez and Bloodsworth on different reasons than those argued at trial, and that as a result, the court refused to consider this claim. The Court assumes *arguendo* that this constitutes deficient performance. However, Harris has not demonstrated a reasonable probability that had appellate counsel made the same arguments as those raised by trial counsel, the result on his appeal would have been different. This sub-claim does not meet the second prong of the *Strickland* test.

Harris next claims that appellate counsel should have claimed that the trial court erred in admitting evidence that he stole the gun with which he shot Mays. Harris claims that the evidence was immaterial and, in the alternative, that even if it was material its materiality was substantially outweighed by its prejudicial impact. Appellate counsel testified in his affidavit that he did not think that the issue had been preserved for appeal, and, even if it had, he did not believe that, had it been raised, it would have been successful. Because Harris has failed to establish that there is a reasonable probability that the issue, if raised, would have resulted in a different result, this sub-claim fails to meet the second prong of the *Strickland* test.

Harris next contends that counsel on appeal should have raised the trial court's denial of his motion to suppress his statements. Appellate counsel testified by affidavit that he did not believe that the issue would have been successful had he raised it. Because the Court has already determined that the issue would not have prevailed, see claim 5 above, Harris cannot establish that is was unreasonable for appellate counsel not to raise the claim; nor can he establish a reasonable probability that, had counsel raised the issue, the decision of the Texas Court of Criminal Appeals would have been different. This sub-claim meets neither prong of the *Strickland* test.

Harris next contends that appellate counsel should have raised the trial court's refusal to suppress evidence of Lockard's identification of him. Appellate counsel testified in his affidavit that he did not believe that the issue would have prevailed: Because the Court has already determined that this issue would not have prevailed, see footnote 2 above, Harris cannot establish that is was unreasonable for appellate counsel not to raise the claim, nor can he establish that there is a reasonable probability that, had counsel raised the issue, the decision in his appeal would have been different. This sub-claim meets neither prong of the *Strickland* test.

Harris next contends that counsel on appeal should have raised the trial court's admission of State's Exhibit No. 1, a photograph of Mays taken before he was killed. Appellate counsel testified by affidavit that he did not believe that this issue would have prevailed had he raised it. Because Harris does not demonstrate that there is a reasonable probability that, had counsel raised the issue, the Court of Criminal Appeals would have reached a different decision, this sub-claim fails to meet the second prong of the *Strickland* test.

Harris next contends that counsel on appeal should have raised the trial court's admitting a videotape of the crime scene. Appellate counsel testified that he did not believe that the trial court erred in admitting the videotape, so he believed the claim was unlikely to prevail on appeal. Harris does not demonstrate that, had counsel raised the issue, the Texas Court of Criminal Appeals would have reached a different decision, so this sub-claim fails to meet the second prong of the *Strickland* test.

Harris next contends that counsel on appeal should have raised the trial court's admitting hearsay testimony concerning an alleged fifth bullet casing. Appellate counsel testified in his affidavit that he believed that the admission of this testimony would have been considered harmless error, so he chose to limit the issues on appeal to those that he felt had a better chance of resulting in reversal. Because Harris does not demonstrate that there is a reasonable probability that had counsel raised the issue, the Texas Court of Criminal Appeals would have reached a different decision, this sub-claim fails to meet the second prong of the *Strickland* test.

Harris next contends that counsel on appeal should have raised as an issue the trial court's admission of testimony that Lockard shuddered when she heard Harris speak during the lineup. Appellate counsel testified in his affidavit that he thought that this claim was not viable. Because Harris does not demonstrate that reasonable counsel would have thought differently, this sub-claim fails to meet the first prong of the *Strickland* test.

Harris next contends that counsel on appeal should have raised the trial court's admission of Lockard's testimony concerning Harris' lack of remorse and his difficulty, if any, in firing the gun. Appellate counsel testified in his affidavit

that he believed that this testimony, if erroneously admitted, constituted harmless error in light of the other evidence against Harris, so he limited his appellate issues to those having a better chance of resulting in a reversal. Because Harris does not demonstrate that there is a reasonable probability that had counsel raised the issue, the Texas Court of Criminal Appeals would have reached a different decision, this sub-claim fails to meet the second prong of the *Strickland* test.

Harris next contends that counsel on appeal should have raised the trial court's admission of hypothetical testimony from Dr. Espinola concerning the relative position of Mays when he was hit with various bullets. Appellate counsel testified in his affidavit that in his opinion the trial court's decision to admit this testimony was not error. Because Harris does not demonstrate that reasonable counsel would have concluded that the trial court erred, this sub-claim fails to meet the first prong of the *Strickland* test.

Harris next contends that counsel on appeal should have appealed the trial court's allowing the State to call Harris as a rebuttal witness immediately following the conclusion of its cross-examination. Appellate counsel testified in his affidavit that he believed that the trial court did not abuse its discretion in allowing this procedure. Harris did not establish why a reasonable attorney would have believed otherwise, so this claim fails to meet the first prong of the *Strickland* test.

Harris next contends that counsel on appeal should have raised the trial court's admitting Dr. Gripon's testimony about Harris' future dangerousness. Because the Court holds that the admission of this testimony was not error, see claim 8 below, counsel's failure to raise the issue does not constitute deficient performance, nor is there a reasonable

probability that had counsel raised the issue, the Texas Court of Criminal Appeals would have reached a different decision. This sub-claim does not meet either prong of the *Strickland* test.

Harris' final contention is that counsel on appeal should have raised the trial court's exclusion of a dictionary definition of the term "deliberate." Because the Supreme Court had held that the term was not vague as used in the punishment questions, see claim 6 above, there is not a reasonable probability that, had counsel raised the issue, the Texas Court of Criminal Appeals would have reached a different decision. This sub-claim does not meet the second prong of the *Strickland* test.

Because Harris' claim that his counsel failed to reasonably investigate and introduce mitigating evidence at the punishment phase of his trial meets both prongs of the *Strickland* test, the Court recommends that this sub-claim be granted. Because none of Harris' other contentions about his trial counsel's or his appellate counsel's conduct meet both prongs of the *Strickland* test, the Court recommends that the remaining sub-claims in his seventh claim be denied.

8. Whether inadmissible evidence was introduced in the punishment phase of Harris' trial.

Harris' eighth and final claim is that he did not receive a fair trial at the punishment phase. He contends that the prosecution introduced evidence of an extraneous crime for which he had been acquitted, extraneous unadjudicated crimes and testimony as to his future dangerousness by a psychiatrist who had never examined him.

Each of Harris' contentions is meritless. Regarding his first contention, the Fifth Circuit has held that evidence of an extraneous offense for which the defendant has been

acquitted is admissible in the punishment phase of a capital case. *See e.g. Vega v. Johnson,* 149 F.3d 354, 359 (5thCir. 1998), *cert. denied,* 525 U.S. 1119 (1999). Regarding his second contention, the Fifth Circuit has held that evidence of unadjudicated extraneous offenses is admissible. *See e.g. Milton v. Procunier,* 744 F.2d 1091, 1097 (5thCir. 1984), *cert.. denied* 471 U.S. 1030 (1985). Harris points out that *Milton* requires that such evidence must meet "properly applied standards of relevance and sufficiency of proof' and asserts that the evidence in his case did not meet those standards. To the extent that his contention is based on the failure of the prosecution to produce certified pen packets, the Court has already rejected that claim in the context of his ineffective assistance of counsel claim. See claim 7 above. To the extent this contention is based on some other grounds, Harris does not provide any explanation or support. Regarding his third contention, the United States Supreme Court had upheld the admissibility of psychiatric testimony on the issue of future dangerousness in the punishment phase of a capital case through the use of a hypothetical question, despite the psychiatrist's failure to personally interview the defendant. *See e.g. Barefoot v. Estelle,* 463 U.S. 880, 903 (1983).

RECOMMENDED DISPOSITION

The Court proposes finding that Harris received ineffective assistance of counsel at the punishment phase of his trial. Accordingly, it recommends that his Petition be granted as to that claim, and a writ of *habeas* corpus issue to the Respondent, directing him to release the Petitioner unless the State of Texas, within a reasonable time, either resentences Petitioner to life imprisonment or conducts a new sentencing hearing. The Court recommends that all of Petitioner's other claims and sub-claims be denied. Within ten days after receiving the Magistrate Judge's Report and

Recommendation, any party may serve and file written objections pursuant to 28 U.S.C. § 636(b)(1)(c). Failure to file written objections within that time period bars an aggrieved party from *de novo* review by the District Court of the Magistrate Judge's Proposed Findings and Recommended Disposition and from appellate review by the Court of Appeals of any factual findings and legal conclusions contained in that recommendation which are accepted or adopted by the district courts, except on grounds of plain error. *Douglass v. United States Automobile Association,* 79 F.3d 1415, 1428 (5thCir. 1996).

SIGNED this 25th day of June, 2000.

WENDELL C. RADFORD
UNITED STATES
MAGISTRATE JUDGE

THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

FILED – CLERK
US. DISTRICT COURT
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TX EASTERN – BEAUMONT
By /s/

DAVID RAY HARRIS, Petitioner,	§	
	§	C.A. No. 1 :92-CV-167
vs.	§	Judge William Wayne Justice
GARY JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division, Respondent.	§	

MEMORANDUM OPINION

Petitioner David Ray Harris ("Harris"), an inmate confined to the Texas Department of Criminal Justice, Institutional Division, filed a petition for the writ *of habeas corpus* pursuant to 28 U.S.C. § 2254. Harris challenged his capital murder conviction and the death sentence imposed in the Criminal District Court of Jefferson County, Texas, in cause No. 46204, *The State of Texas v. David Ray Harris.*

On December 6, 1999, this case was referred pursuant to 28 U.S.C. § 636(b)(l)(B) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrate Judges for proposed findings and

recommendations for the disposition of the case. The Court gave the parties the opportunity to submit additional pleadings before submitting its proposed findings and recommended disposition.

On June 25, 2001, The Hon. Wendell C. Radford, United States Magistrate Judge, entered his Report and Recommendation, recommending that the Court grant the petition in part, on the ground that Harris received ineffective assistance of counsel at the sentencing phase of his trial. Both Parties filed timely objections to the Report and Recommendation, Harris objecting to recommendations that several of his claims be denied, and the Director objecting to the proposed findings underlying the single claim upon which the Magistrate Judge recommended granting relief. Pursuant to 28 U.S.C. §636 (b)(1)(C), the Court is required to make a *de novo* review of those portions of the report and specified proposed findings and recommendation to which objections were made. The Court may then accept, reject, or modify, in whole or in part, the findings and recommendations made by the Magistrate Judge. As explained below, the Court finds that Petitioner's objection that the jury was unable to give effect to evidence that the victim shot first is well-taken, and therefore rejects the Magistrate Judge's recommendation that this claim be denied. Twice in response to objections, and once on its own motion, the Court makes minor modifications to the Magistrate Judge's proposed findings. In all other respects, the Court adopts the Magistrate Judge's Report and Recommendation.

Harris first objects to the Magistrate Judge's proposed finding that the jury was not precluded from considering mitigating evidence in the record. The record reveals that Harris presented evidence of improving conduct in prison, alcoholism which was responding to treatment, intoxication

at the time of the offense, cooperation with the police, and remorse for his actions. The Magistrate Judge proposed a finding that the jury could consider this evidence in the context of two of the special issues presented at sentencing: whether Harris' conduct in killing Mays was deliberate, and whether there was a probability that Harris would commit acts of criminal violence which would pose a continuing threat to society.

In *Franklin v. Lynaugh*, 487 U.S. 164 (1988), a plurality of the United States Supreme Court held that the "future dangerousness" special issue gave the jury a vehicle to consider evidence of good conduct in prison. Concurring in the result, Justice O'Connor opined:

> If . . . petitioner had introduced mitigating evidence about his background or character or the circumstances of the crime that was not relevant to the special verdict questions, or that had relevance to (his) moral culpability beyond the scope of the special verdict questions, the [special issues] would have provided the jury with no vehicle for expressing its "reasoned moral response" to that evidence. If this were such a case, then we would have to decide whether the jury's inability to give effect to that evidence amounted to an Eighth Amendment violation.

Id. at 185. The next year, in *Penry v. Lynaugh*, 492 U.S. 302, 323 (1989), the Court found that mental retardation and an abusive upbringing were examples of evidence which were relevant to a defendant's moral culpability but beyond the scope of the "deliberateness" and "future dangerousness" special issues.

Franklin disposes of that part of Harris' claim based upon prison conduct. In contrast to Penry's evidence of

mental retardation and abusive upbringing, it is found that Harris' alcoholism, intoxication, cooperation with authorities and remorse did not have relevance beyond the scope of the "deliberateness" and "future dangerousness" special issues. Thus the Court finds no merit in Harris' first objection.

Harris next objects to the Magistrate Judge's proposed finding that the special issues allowed the jury to give effect to evidence that Mays shot first. As explained above, the first issue is whether the evidence has relevance beyond the scope of the three special issues. The Magistrate Judge correctly found that this evidence was relevant to the third special issue, whether the killing was unreasonable in response to the provocation, if any, by the deceased. To give Harris a life sentence, the jury merely needed to answer this question in the negative.

The analysis does not end here, however. In *Penry v. Johnson*, ___U.S. ___, 121 S.Ct. 1910 (June 4, 2001), the United States Supreme Court recently held that jury instructions prevent a jury from giving effect to mitigating evidence if the instructions are internally contradictory and therefore confusing to the jury. The Court held unconstitutional the later Texas capital sentencing scheme in which each juror must first answer affirmatively the three special issues: "deliberateness," "future dangerousness," and "inadequate provocation," in order to sentence an offender to death. The jurors were instructed that if in considering mitigating evidence beyond the scope of the special issues they felt a life sentence was appropriate, they should change one of the answers on the special issues from "yes" to "no." The Court found that this scheme put jurors in the untenable position of giving untrue answers to the special issues in order to give effect to mitigating evidence. *Id.* at 1921-22.

Although the jury in this case did not receive the same instructions as were given in *Penry II*, the instructions they received caused a similar problem. In the guilt phase of his trial, Harris offered evidence that the victim shot him first in the context of two defenses: self defense, or, in the alternative, that he was guilty only of voluntary manslaughter, not murder. In rejecting his manslaughter defense, the jury found that the killing was not done while Harris was "under the immediate influence of sudden passion based upon adequate cause." A juror who believed that Harris should receive a life sentence instead of the death penalty because he killed his victim only after the victim shot him first, could only do so by answering in the negative the third special issue - that the killing was unreasonable in response to the provocation, if any, by the deceased. Because this would appear inconsistent with the answer given at the guilt phase of the trial, the juror could not logically answer this question in the negative; accordingly, the juror could not give mitigating effect to this evidence. It is found that this objection is meritorious.

Harris next objects that the special issues prevented the jury from considering evidence that Harris suffered emotional abuse as a child. As discussed above, the United States Supreme Court so held in *Penry I*. Unlike the defendant in that case, however, Harris did not attempt to introduce any evidence of his abusive upbringing. The Magistrate Judge correctly relied upon Fifth Circuit precedent which precludes attacking the adequacy of the special issues in the context of evidence not offered at trial.

Harris contends that because of that precedent, any attempt by counsel to offer such evidence would have been futile, and accordingly, he should be allowed to attack the constitutionality of the special issues despite not offering the evidence to which the jury was allegedly prevented from

giving effect. Prior to the federal evidentiary hearing, Harris argued that counsel's decision not to offer such evidence was tactical. The evidence at that hearing contradicted that argument; and as explained below, this Court agrees with, and adopts, the Magistrate Judge's proposed finding that Harris' trial counsel's decision not to introduce this evidence was instead based upon a mistaken assumption that Harris did not want such evidence introduced. The Court accordingly finds no merit in this objection.

Harris next objects to the Magistrate Judge's proposed finding that the flawed jury instruction on voluntary manslaughter was harmless error. Upon reviewing the record, the Court finds no evidence that the flaw in the instruction – incorrectly placing upon the defendant the burden of proving that Harris acted under the immediate influence of sudden passion based upon adequate cause - had a substantial and injurious effect on the jury's determination of its verdict. *See Mayabb v. Johnson,* 168 F.3d 863, 867-68 (5th Cir.), *cert. denied,* 528 U.S. 969, (1999). It is found that there is no merit in this objection.

Harris next objects that the Magistrate Judge erred in distinguishing the facts of his case from the facts in *Havard v. State,* 800 S.W.2d 195 (Tex.Crim.App.1989). Because *Havard* is a state-law case, and because the Court agrees with and adopts the Magistrate Judge's alternative analysis of this issue based upon *Mayabb,* a federal *habeas corpus* case, the Court finds it unnecessary to address this objection.

Harris next objects that the Magistrate Judge erred in denying his claim that the prosecutor's closing argument denied him a fair trial. Upon reviewing the record, the Court agrees with and adopts the Magistrate Judge's conclusion that although the prosecutor should not have argued that the people of the county expected a guilty verdict, his

misconduct was not pronounced or persistent, and the evidence of guilt presented was not so insubstantial that Harris would have been acquitted but for the prosecutor's statement. *See Jones v. Butler,* 864 F.2d 348, 356 (5th Cir. 1988), *cert. denied,* 490 U.S. 1075 (1989). No merit is found in this objection.

Harris next objects to the Magistrate Judge's proposed finding that his confession should have been suppressed because of unconstitutional actions by the police. Harris raised four sub-claims. The Court agrees with and adopts the Magistrate Judge's recommendation that Harris' claim that the search of his vehicle was unconstitutional is barred from consideration in federal *habeas corpus* pursuant to *Stone v. Powell,* 428 U.S. 465, 494-95 (1976). Upon reviewing the record, the Court agrees with and adopts the Magistrate Judge's proposed findings that Harris voluntarily and knowingly waived his rights under *Miranda v. Arizona,* 384 U.S. 436, 468-69 (1966), that police chief Kitrell did not exert undue psychological pressure on Harris in procuring his confession, and that Harris was not held for an unreasonable length of time before being taken before a state Magistrate Judge. No merit is found in this objection.

Harris next objects that the Magistrate Judge erred in proposing a finding that the wording of the three special issues is unconstitutionally vague. The Magistrate Judge correctly relied on *James v. Collins,* 987 F.2d 1116, 1119-20 (5th Cir.), *cert. denied,* 509 U.S. 947 (1993), in recommending that this claim be denied. It is found that there is no merit in this objection.

Harris next objects that the Magistrate Judge erred in proposing a finding that his trial counsel did not render ineffective assistance at the guilt/innocence phase of his trial. He raised ten sub-claims. As to each sub-claim, the

Magistrate Judge found that Harris could not establish one of the two elements of an ineffective assistance of counsel claim, which are, first, that his counsel's actions were objectively unreasonable, and second, had counsel acted reasonably, there is a reasonable probability that the result in the case would have been different. *See Strickland v. Washington,* 466 U.S. 668, 686-88 (1984).

Upon reviewing the record, the Court agrees with and adopts the following of the Magistrate Judge's proposed findings:

1. Harris did not establish that there was a reasonable probability that, had counsel argued that the search of Harris' truck was improper, the result of the guilt/innocence phase of his trial would have been different.

2. Harris did not establish that there was a reasonable probability that, had counsel cited legal authority in his motion to suppress Harris' confession, the result of the guilt/innocence phase of his trial would have been different.

3. Harris did not establish that there was a reasonable probability that, had counsel moved to suppress witness Lockard's initial identification of Harris on the grounds that it resulted from an impermissively suggestive line-up, and that her testimony was enhanced through hypnosis, the result in the guilt/innocence phase of his trial would have been different.

4. Counsel's tactical decision to defend Harris on the grounds that Harris either acted in self-defense, or in the alternative, that he was guilty only of voluntary manslaughter, rather than to pursue a defense that Harris was incapable of forming the specific intent necessary to sustain a conviction for first-degree murder, was not objectively unreasonable.

5. Harris did not establish that there was a reasonable probability that, had counsel further investigated the lie-detector test given to witness Lockard, the result in the guilt' innocence phase of his trial would have been different.

6. Harris did not establish that there was a reasonable probability that, had counsel objected to witness Lockard's testimony that he did not seem to be in a hurry when he got into his truck, the result in the guilt/innocence phase of the trial would have been different.

7. Harris did not establish that there was a reasonable probability that, had counsel objected to the prosecution's statement in closing argument (see p. 6) on the grounds that it was outside the record, the result in the guilt/innocence phase of his trial would have been different.

8. Harris did not establish that there was a reasonable probability that, had counsel challenged venirepersons LaFleur and Hernandez on the grounds that they had formed an opinion as to Harris' guilt, the result in the guilt/innocence phase of the trial would have been different.

9. Harris did not establish that there was a reasonable probability that, had counsel objected to the admission of two of the statements he made during interrogation – that he "was out looking for a piece" and that he fired the last shot at the victim in order to "finish him off" – the result in the guilt/innocence phase of Harris' trial would have been different.

10. Harris did not establish that there was a reasonable probability that had counsel, before trial, hired an expert witness to provide testimony on the issue of how far Harris was from his victim at the time he fired the final shot, or, had counsel requested a continuance during trial and attempted to

hire such an expert, the result in the guilt/innocence phase of his trial would have been different.

Because the Court agrees with and adopts the Magistrate Judge's proposed finding that Harris cannot establish the first element of the *Strickland* ineffective assistance of counsel test as to one of his ten sub-claims and that he cannot establish the second element of the test as to the other nine sub-claims, it is found that Harris' objection is without merit.

Harris next objects that the Magistrate Judge erred in proposing a finding that his trial counsel did not render ineffective assistance by providing information (beyond the scope ofa release he signed) to the producers of a documentary movie about a prior murder. Having reviewed the record, the Court agrees with and adopts the Magistrate Judge's proposed finding that Harris did not establish that there was a reasonable probability that, had Harris' counsel not provided the information to the producers of the documentary, the result in his appeal of the present case would have been different. It is found that this objection is without merit.

Harris next objects that the Magistrate Judge erred in finding that his counsel on appeal provided constitutionally effective assistance. Harris raised fifteen sub-claims. As to each, the Magistrate Judge found that Harris was unable to establish one of the two elements of the *Strickland* test for ineffective assistance of counsel. Upon reviewing the record, the Court agrees with and adopts the following of the Magistrate Judge's proposed findings:

1. Harris did not establish that there was a reasonable probability that, had appellate counsel properly presented his claim that the prosecutor made improper argument in the

punishment phase of Harris' trial, the result in the appeal would have been different.

2. Harris did not establish that there was a reasonable probability that, had appellate counsel claimed on appeal that the trial Court erred in refusing his challenge for cause of venireperson Sowards, based upon her friendship with one of the prosecutors, the result in the appeal would have been different.

3. Harris did not establish that there was a reasonable probability that, had appellate counsel alleged the correct grounds in his claim on appeal that the trial court erred in denying trial counsel's challenges for cause of venirepersons Hernandez and Bloodsworth, the result in the appeal would have been different.

4. Harris did not establish that there was a reasonable probability that, had appellate counsel claimed that the trial court erred in admitting evidence that Harris stole the gun with which he committed the killing, the result in the appeal would have been different.

5. Appellate counsel's decision not to claim that the trial court erred in denying trial counsel's motion to suppress Harris' statements, on the ground that the claim had little chance of prevailing on appeal, was not objectively unreasonable, and Harris did not establish that there was a reasonable probability that, had appellate counsel raised the claim, the result in the appeal would have been different.

6. Appellate counsel's decision not to claim that the trial court erred in denying trial counsel's motion to suppress Lockard's in-court identification of Harris, on the grounds that the claim had little chance of prevailing on appeal, was not objectively unreasonable, and Harris did not establish that there was a reasonable probability that, had appellate

counsel made the claim, the result in the appeal would have been different.

7. Harris did not establish that there was a reasonable probability that, had appellate counsel claimed that the trial court erred in admitting a photograph of the victim taken before he was killed, there is not a reasonable probability that the result in the appeal would have been different.

8. Harris did not establish that there was a reasonable probability that, had appellate counsel claimed that the trial court erred in admitting a videotape of the crime scene, the result in the appeal would have been different.

9. Harris did not establish that there was a reasonable probability that, had appellate counsel claimed that the trial court erred in admitting hearsay testimony concerning an alleged fifth bullet casing found at the scene of the killing, the result in the appeal would have been different.

10. Appellate counsel's decision not to claim that the trial court erred in admitting testimony of witness Lockard's reaction to hearing Harris' voice at the line-up on the grounds that the issue had little chance of prevailing on appeal was not objectively unreasonable.

11. Harris did not establish that there was a reasonable probability that, had counsel claimed that the trial court erred in admitting witness O'Quinn's testimony about Harris' lack of remorse and his difficulty, if any, in firing the gun, the result in the appeal would have been different.

12. Appellate counsel's decision not to claim that the trial court erred in admitting testimony from Dr. Espinosa about the victim's position as he was struck by bullets, on the grounds that the issue had little chance of prevailing on appeal, was not objectively unreasonable.

13. Appellate counsel's decision not to claim that the trial court's allowing the prosecution to call Harris as a rebuttal witness following the conclusion of its cross-examination on the grounds that the claim had little likelihood of prevailing on appeal was not objectively unreasonable.

14. Appellate counsel's decision not to claim that the trial court erred in admitting the testimony of Dr. Gripon about the probability of Harris' future dangerousness, on the ground that the claim had little likelihood of prevailing on appeal, was not objectively unreasonable, and Harris did not establish that there was a reasonable probability that, had counsel made the claim, the result in the appeal would have been different.

15. Harris did not establish that there was a reasonable probability that, had counsel claimed that the trial court erred in refusing to provide the jury with a dictionary definition of the term "deliberate," an important term in the first punishment special issue, the result in the appeal would have been different.

Because the Court agrees with and adopts the Magistrate Judge's proposed finding that Harris cannot establish the first element of the *Strickland* ineffective assistance of counsel test as to three of his fifteen sub-claims, that he cannot establish the second element of the test as to nine of his fifteen sub-claims, and that he cannot establish either element of the test as to the remaining three of his fifteen sub-claims, it is found that this objection is without merit.

Harris next objects to the Magistrate Judge's proposed finding that the trial court's admission of evidence of offenses of which he had been acquitted did not deny him a fair trial. The Magistrate Judge properly relied on *Vega v. Johnson,* 149 F.3d 354, 359 (5th Cir. 1998), *cert. denied,* 525

U.S. 1119 (1999). It is found that this objection is without merit.

Harris next objects to the Magistrate Judge's proposed finding that the trial court did not deny him a fair trial by admitting testimony on the issue of the probability of Harris' future dangerousness by a psychiatrist who had not examined him. The Magistrate Judge correctly relied on *Barefoot v. Estelle*, 463 U.S. 880, 903 (1983). It is found that this objection is without merit.

Harris next objects that the Magistrate Judge erred in stating, in his discussion of Harris' ninth ineffective assistance of trial counsel sub-claim, that evidence was presented that the fatal shot, which was fired from a distance of one to two feet, was fired at the victim's head, instead of his torso. The Magistrate Judge's proposed finding was that, in light of evidence that Harris fired a fatal shot into the victim's head from a close distance, there was not a reasonable probability that, had counsel objected to the admission of testimony that Harris fired the final shot into the victim in order to "finish him off," the result in the guilt / innocence phase of the trial would have been different. See page 8. The Court modifies the Magistrate Judge's proposed finding by replacing the word "head" with "torso," and accepts and adopts the proposed finding as modified.

Harris next objects that the Magistrate Judge erred in his proposed finding that any alleged bias towards him by the Court of Criminal Appeals of the State of Texas was irrelevant to whether he received a "full and fair hearing" on his state application for post-conviction relief. Harris does not directly take issue with the proposed finding; rather, he contends that, "If the Court of Criminal Appeals was biased against Harris on direct appeal, that is clearly relevant to the constitutionality of Harris' conviction and sentence." The

Court agrees with this statement in the abstract, but although Harris alleged such bias, the single substantive legal error he alleges the Texas Court of Criminal Appeals made was in the context of the erroneous manslaughter charge, a claim this court has already found does not entitle Harris to relief. See page 5. It is found that this objection is immaterial.

Harris' final objection is that the Magistrate Judge erred in proposing a finding that the third special issue is not unconstitutionally vague, and that it provides an adequate mechanism for the jury to express its views regarding the appropriateness of the death penalty under the circumstances. This objection is a combination of two objections already made by Petitioner. The Court addressed the first objection on page 7 of this opinion and the second on pages 3-4, so it will not repeat itself here.

Respondent's first objection is that the Magistrate Judge erred in proposing finding that, on the claim of trial counsel's alleged ineffective assistance at the punishment phase of Harris' trial, the evidence produced by Harris was rebutted by clear and convincing evidence the presumption of correctness applicable to the findings of the Texas Court of Criminal Appeals on Harris' application for post-conviction relief. As a preliminary matter, the Court notes that under the law applicable at the time this petition was filed, the standard was "convincing" evidence, not "clear and convincing" evidence. *See Jackson v. Anderson,* 112 F.3d 823, 824-25 (5th Cir. 1997), *cert. denied,* 522 U.S. 1119 (1998). The Magistrate Judge found that the State court's findings of fact were based upon affidavits submitted by trial counsel, and that counsels' testimony at the evidentiary hearing differed from their earlier affidavits on two material points: first, whether counsel conveyed all relevant facts to Harris, and second, whether the decision not to present

evidence of Harris' childhood was made voluntarily, knowingly, and intelligently by Harris.

Ignoring the discrepancy, Respondent contends that evidence in both counsels' affidavits and their later testimony supported the state judge's findings. The Magistrate Judge, however, was correct not to constrain his review to merely determining whether there was evidence in the record which would support the state court's finding; instead, he determined that the discrepancies between counsel's testimony at the evidentiary hearing, which was subject to cross-examination, and which the state court did not have the opportunity to consider, and counsel's earlier affidavits, left the judge with a definite and firm conviction that the state court's findings were incorrect. Having reviewed the record, the Court agrees with and adopts the Magistrate Judge's proposed finding, with the modification that the correct legal standard is "convincing" evidence, rather than "clear and convincing" evidence. No merit is found in this objection.

Respondent's next objection is that the Magistrate judge erred in determining that there was any material discrepancy between Harris' trial counsels' affidavits and their later testimony. Respondent contends that counsel testified repeatedly that they counseled Harris of the importance of presenting mitigating evidence at the punishment phase of his trial, and that Harris repeatedly instructed them not to present any mitigating evidence. This, however, is not what the Magistrate Judge proposed to find. As the Magistrate Judge pointed out on pages 33-36 of his Report and Recommendation, counsel stated in their affidavit, and the state court found, that all decisions about what evidence to present and what witnesses to call at the punishment phase of the trial were made by Harris, yet, at the evidentiary hearing, counsel testified that they called witnesses and presented

evidence at the punishment phase of the trial despite allegedly being told not to do so by Harris. The Magistrate Judge reasonably concluded that if counsel felt free to disregard their client's instructions not to present any mitigating evidence, they should not be allowed to shield their performance from scrutiny based upon those same instructions. It is found that this objection is without merit.

Respondent next objects that the Magistrate Judge erred in making an "implicit determination" that Harris' counsel's failure to develop evidence that Harris was of below average intelligence or had suffered brain damage constituted deficient performance. Respondent is correct that, had Harris' counsel testified that their decision not to introduce evidence on this point was due to the reasons Respondent now argues, the Court would determine that the failure to offer such evidence would not have been deficient performance. The Magistrate Judge, however, proposed a finding that counsel's failure to investigate this possibility, among others, was based on instructions from the client not to present mitigating evidence. The Magistrate Judge then proposed a finding that, because counsel either was mistaken as to the scope of the instructions or nevertheless felt free to disregard the instructions, his failure to investigate and present this evidence constituted deficient performance. This Court agrees with and adopts the Magistrate Judge's proposed finding, and finds Respondent's objection to any supposed "implicit determination" without merit.

Respondent next objects that, because the Magistrate Judge's "implicit determination" of the first element of the *Strickland* ineffective assistance of counsel test was erroneous, the Magistrate Judge erred in weighing the effect of the evidence in the second element of the *Strickland* test. Because the Court agrees with and adopts the Magistrate Judge's proposed finding regarding the deficient

performance element of the *Strickland* test, it finds this objection to be without merit.

Respondent next objects to the Magistrate Judge's "implicit determination" that defense counsel's failure to investigate, develop and present evidence regarding Harris' prior prison record was deficient performance. In analyzing whether there was a reasonable probability that, had Harris' counsel presented evidence of his background, the result in the punishment phase of his trial would have been different, the Magistrate Judge compared Harris' prior prison record (among other factors) with the prior prison record of two petitioners in recent and similar cases. The Magistrate Judge noted on page 26 of his Report and Recommendation that such evidence was double-edged; stating that Harris' prison conduct was "far from exemplary" but "at least showed steady improvement." The Court agrees with Respondent that even had counsel offered other evidence of Harris' background, Harris may well have decided, based upon counsel's recommendation, not to offer evidence of his behavior in prison. Indeed, had Harris presented favorable evidence of his background, the Respondent may have sought to introduce this evidence in rebuttal. The Magistrate Judge presumed this evidence would be offered in order to more accurately compare Harris' case with the other two cases. However, even if the evidence had been offered, it would not have changed the overall result of the prejudice determination, the Court finds this objection to be without merit.

Respondent next objects that the Magistrate Judge erred in considering evidence of Harris' prison conduct in analyzing whether there was a reasonable probability that, had counsel presented all of the evidence they should have presented, the result in the punishment phase of his trial

would have been different. The Court answered this objection in the previous paragraph.

Respondent next objects that the Magistrate Judge erred in stating that the reason Harris' counsel did not introduce expert testimony at the punishment phase of his trial was because they felt the jury would not be impressed by "hired gun" experts. Because the Magistrate Judge did not propose a finding that the failure to present expert testimony on the issue of Harris' future dangerousness constituted deficient performance, the Court finds this objection immaterial.

Respondent next objects to the Magistrate Judge's proposed finding that counsel's failure to investigate, develop and present evidence of Harris' background constituted deficient performance. This Court agrees with and adopts the Magistrate Judge's opinion that the failure to do so was unreasonable in light of evidence that Harris' instructions not to present such evidence were ambiguous, that counsel believed that Harris would have a change of heart, and that either Harris in fact had a change of heart or counsel felt free to disregard his instructions not to present mitigating evidence. Respondent does not address these material facts in his objection, so the Court finds the objection to be without merit.

Respondent next contends that the Magistrate Judge erred in making the "implicit finding" that Harris only instructed counsel not to call family members as witnesses at trial, but did not specifically prohibit his trial counsel from presenting evidence about his background through the use of non-family member witnesses. Respondent contends that "[t]he record is uncontroverted that Harris specifically instructed his attorneys not to call his family members to the stand and not to present evidence, from any source, regarding his childhood and family history."

The Court finds, however, that the evidence in the record was conflicting on this issue. For example, in an affidavit attached to his federal petition Harris controverted even the notion that he instructed counsel not to call his family members as witnesses at trial:

> Counsel never told me that they had spoken with any of my family members nor investigated my background in any way to build mitigating evidence to be presented at the penalty phase. Nor did counsel have any in-depth discussions with me about mitigating evidence in my background . . . . If my counsel had explained to me the importance of mitigating evidence, I certainly would have instructed them to interview my family members and to elicit testimony from them. . . .

Faced with conflicting testimony, the Magistrate Judge crafted his proposed findings on this issue by crediting some parts of each witness' testimony and discrediting others, according to what seemed most likely true. The Magistrate Judge proposed a finding that counsel most likely did not have in-depth discussions with Harris about the importance of mitigating evidence because the Magistrate Judge credited counsel's testimony that Harris initially claimed that he did not want his family involved, that he wanted to focus on the guilt-innocence phase of the trial and that he preferred the death penalty (or freedom) to a sentence of life in prison. In light of the lack of in-depth explanation by counsel, the Magistrate Judge proposed a finding that Harris did not give explicit, detailed instructions on whether counsel could, or should, investigate mitigating evidence in his background through non-family member witnesses. Having reviewed the record, the Court agrees with and adopts this finding. The Court finds that this objection is without merit.

Respondent next objects that the record does not support the Magistrate Judge's finding that "counsel completely abandoned investigating Harris' childhood" after Harris instructed them not to involve his family. The record shows that counsel did talk with Harris' mother on two or three occasions, after being told by Harris that he did not want his family involved. Other testimony by counsel supports the inference that counsel did not vigorously pursue the issue of Harris' background:

Q. Would you agree with me that an effective and competent lawyer would have discovered all of the — assuming it existed, all of the information that I've just gone over with you about [Harris]' background?

A. In this case counselor, I think an effective and competent lawyer, once he satisfied himself that his client understood the strategy decision he was making, he would not have spent his time chasing things the client didn't want him to put into the case.

The Court will modify the sentence to which Responded objected to state: "After Harris refused to allow his attorneys to involve his family members, his attorneys did not try to develop evidence of his family background through non-family members." So modified, the Court agrees with and adopts the Magistrate Judge's proposed finding.

Respondent next objects that there is no indication in the record that Harris would have agreed to the presentation of testimony, whether from family members or non-family members, concerning his childhood and family. The passage from Harris' affidavit, quoted on page 18, refutes this contention. The Court finds that this objection is without merit.

Respondent next objects that any testimony of non-family witnesses regarding Harris' background would have been hearsay. Without reviewing the specific testimony that would have been offered, the Court cannot determine whether the evidence would be inadmissible. Accordingly, it finds that this objection is without merit.

Respondent next objects that the Magistrate Judge's proposed finding that counsel believed that evidence concerning Harris' childhood and family background "would probably mean the difference between life and death" is not supported by the record. The Court notes that attorney Powell's testimony appears conflicting on this point. The Report and Recommendation quoted the following passage from trial attorney Powell's testimony at the evidentiary hearing:

Q. Did you ever tell [Harris] that failing to call family witnesses, failing to call any other witnesses at the punishment phase could, in fact, make the difference between life and death for him?

A. Would probably, in fact.

The Court notes that Powell repeated and clarified this answer during the same cross-examination:

Q. And you don't recall at any point in time telling David that this decision could, in fact, result in him receiving death instead of life, do you?

A. I think what I told David was that it probably could result.

Respondent quotes other passages from Powell's testimony in which he stated that he did not believe that, in an average case, family background information would be

the difference between life and death, and that, in this case, he believed that background and upbringing testimony would have given Harris a "chance" of getting a life sentence, but probably not a "pretty good chance." In reconciling this testimony, the Court finds that, at the time counsel raised the point with Harris, his client, it was more likely that Powell believed what he said, for three reasons: First, since Harris was first shot by the victim, this was not an "average" case; Second, counsel are presumed to believe what they say to their clients, and third, such a belief would have been reasonable under the circumstances. The Court finds that counsel's seemingly contradictory testimony resulted from his belief in the likely persuasiveness of this evidence lessening as the years passed. The Court agrees with and adopts the Magistrate Judge's proposed finding and finds that the objection is without merit.

Respondent's final objection is that the Magistrate Judge erred in proposing a finding that there was a reasonable probability that, had Harris presented mitigating evidence abou this background and upbringing, the result in the punishment phase of his trial would have been different. The Magistrate Judge proposed this finding based upon a comparison between the evidence that would have been presented in this case and the evidence presented in two similar cases, *Duhamel v. Collins,* 955 F.2d 962 (5th Cir. 1992) and *Williams v. Taylor,* 529 U.S. 362 (2000).

Respondent contends that the analysis is invalid for two reasons: First, in contrast to the Petitioner in *Williams,* Respondent contends that the record in the present case is uncontroverted that Harris would not have allowed any background and upbringing evidence to be presented. Second, even if Harris would have allowed the presentation of such evidence, the State could have effectively cross-examined his family and/or non-family background and

upbringing witnesses. Respondent's first contention is factually incorrect: As pointed out on page 18, Harris stated in the record that he would have allowed counsel to present such evidence and testimony. Respondent's prediction that the prosecution's cross-examination would have so weakened the mitigation evidence that it would have not been reasonably probable that the result in the case would have been different is too speculative to prevent this Court from agreeing with and adopting the Magistrate Judge's proposed finding. The Court finds that this objection is without merit.

In summary, the Court adopts the proposed findings and recommendations of the Magistrate Judge as to all of Harris' claims except his claim that the third special issue did not allow the jury to give effect to evidence that Harris was shot first by the victim. The Court finds meritorious Harris' objection to the Magistrate Judge's proposed finding and recommendation that that claim should be denied, and instead finds that the claim should be granted. Having found that Petitioner is entitled to partial relief on two of the claims in his petition, a conditional writ of *habeas corpus* will issue to Respondent, directing him to release the petitioner unless the State of Texas, within 180 days from the entry of the judgment, either sentences Harris to life imprisonment or commences a new sentencing hearing. An Order and Judgment will be entered.

SIGNED this24th day of September, 2001.

/s/
William Wayne Justice
Senior United States District Judge

APPENDIX G

28 U.S.C. § 2254 (before 1996 amendment)

§ 2254. State custody; remedies in State courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the court of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the court of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit--

(1) that the merits of the factual disputed were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional rights, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court

concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(2)

Supreme Court, U.S.
FILED
MAY 8 2003
OFFICE OF THE CLERK

No. 02-1433

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID RAY HARRIS,
Petitioner,

v.

JANIE COCKRELL, Director,
Texas Department of Criminal Justice,
Institutional Division
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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37 pp

CAPITAL CASE

QUESTIONS PRESENTED

1a. Whether the federal district court impermissibly ignored presumptively correct state court findings of fact to find deficient performance of counsel at the punishment phase, particularly in light of Harris' unwillingness to cooperate with and assist counsel in preparing for the punishment phase, his explicit instructions that counsel focus on the guilt-innocence phase, and his refusal to allow counsel to present evidence concerning his family.

1b. Whether, in any event, the court of appeals correctly determined that Harris was not prejudiced by trial counsel's failure to present the identified mitigating evidence in light of the relative weakness of the evidence.

2. Whether the admission of testimony at punishment regarding Harris' prior arrest for attempted burglary and subsequent kidnapping charge was constitutionally permissible, when Harris was ultimately convicted of robbery, burglary and attempted burglary but acquitted of kidnapping.

3. Whether the punishment charge – which included a special issue regarding provocation by the victim – allowed jury consideration of evidence that the victim shot first.

4. Whether the punishment charge allowed jury consideration of evidence of alcoholism and intoxication as presented at trial.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

In 1986, Harris was convicted by a jury of capital murder and sentenced to death for murdering Mark Mays during the course of committing or attempting to commit kidnapping of Mays' girlfriend. After unsuccessfully challenging his conviction and sentence in state direct appeal and habeas corpus proceedings, Harris filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 in federal district court. Despite the existence of presumptively correct state court fact findings disposing of Harris' claims of constitutional error, the federal district court conducted two evidentiary hearings and ultimately, more than nine years after Harris' petition was filed, granted Harris habeas relief as to punishment on two claims. The Fifth Circuit Court of Appeals reversed the district court's judgment granting relief on those claims and affirmed the judgment as to three claims cross-appealed by Harris. Harris now seeks certiorari review of the Fifth Circuit's judgment. Harris, however, does not present a compelling reason for this Court to review his claims and certiorari review should be denied.

STATEMENT OF THE CASE

I. Facts of the Crime

In the pre-dawn hours of September 1, 1985, Harris broke into the apartment of Mark Mays in Beaumont, Texas, as Mays and his girlfriend, Roxanne Lockard, slept. Harris, armed with a .38 caliber revolver, made his way to the bedroom occupied by Mays and Lockard and awakened them. He instructed Mays to get out of bed and lock himself in a hallway bathroom, which he did. He directed Lockard to get out of bed and put on some clothes, which she did. He then led Lockard out the back door of the apartment at gunpoint and directed her to get into his pickup truck, which was parked in a driveway behind the apartment.

About that time, Mays exited the back door of the apartment and stood in front of Harris' truck with a gun in his hands. Lockard testified at trial that she then heard gunfire but that she could not determine who fired first because she immediately took cover. She got out of the truck and did not see Harris, but she did see Mays in front of the truck,

partially bent over "like he was throwing up." Realizing Mays had been shot, Lockard ran inside the apartment complex to find someone to call the police and an ambulance.

Police found Mays lying in a pool of blood with his gun underneath him. An autopsy revealed he died from multiple gunshot wounds, two of which were fatal.[1] A trace metal test came back positive for both of Mays' hands, and there was evidence he shot his gun at least four times.

According to Harris, Mays shot first, hitting Harris first in the neck then in the shoulder, before Harris ducked behind the door of his truck and began shooting at Mays. After shooting Mays several times, Harris ran to the front of the truck where he saw Mays on his hands and knees and shot him one last time, this time from about ten feet away.[2] Harris then got into his truck and drove away.

II. Pretrial Preparations and Development of Trial Strategy

Harris played an active role in the preparation of his case for trial. The testimony is uncontroverted that it was Harris' chosen strategy to present a defense of voluntary manslaughter at the guilt-innocence phase of trial, and he instructed trial counsel to focus their efforts on winning at the guilt-innocence phase. 6 R 133, 144, 179; 5 R 95-96.[3] Indeed, as trial counsel Dennis Powell testified and Harris himself acknowledged, Harris informed his attorneys that if he lost at guilt-innocence and was convicted of capital murder, he would rather be sentenced to death than serve a life sentence in prison. *Id.* Harris, in fact, specifically instructed his attorneys not to seek a plea bargain with the State, and in conformity with those instructions, trial counsel did not engage in plea negotiations. 6 R 218; 5 R 96; *see also* 5 R 64-65.

Nevertheless, trial counsel did conduct some preliminary investigation into Harris' background. Dennis Powell spoke with Harris' mother on several occasions and asked her to write a statement

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[1]Mays had gunshot wounds on both arms, his right shoulder, which wound was disabling, and his face. He also had two wounds to his chest area which were fatal.

[2]However, a forensic pathologist testified that the stippling on Mays' body indicated that the muzzle of the gun was within twelve to twenty-four inches of his body when one of the fatal shots was fired.

[3]"R" refers to the record on appeal in the instant federal habeas corpus proceeding, volumes 5, 6 and 9 of which contain the transcribed testimony of witnesses at the evidentiary hearings conducted in federal district court.

for him describing Harris' childhood and their family background. Ann Harris testified that she, in fact, provided Powell with a very lengthy description of Harris' background. 6 R 31-32. Harris' mother also gave Powell "literally boxes of stuff" pertaining to Harris' background, including school records, employment records, and other "memorabilia," which trial counsel reviewed. 6 R 123. Trial counsel obtained Harris' school records from his mother and had reviewed the records from Harris' prior incarceration in California, which had been obtained by the State prior to trial. 6 R 123, 152, 173-175, 212.

Whenever trial counsel attempted to bring up the subject of punishment-phase evidence, however, Harris told them he was not interested in presenting additional evidence at the punishment phase. 6 R 94, 123, 130, 179. Trial counsel spoke with Harris concerning this issue on several occasions and repeatedly attempted to explain to Harris the importance of presenting mitigating evidence at the punishment phase, but Harris steadfastly refused to aid trial counsel in identifying potential sources of mitigating evidence and instructed them to focus solely on the guilt-innocence phase. 6 R 130-132, 144, 148, 179.

In addition to his general instructions regarding the punishment phase, Harris also specifically instructed his attorneys not to call his family members to the stand and not to present evidence regarding his family background. It is uncontroverted that evidence of Harris' family history was strictly "off-limits" to trial counsel during his 1986 trial. 6 R 121, 128-131, 147-148, 178-180 (Dennis Powell); 6 R 201, 205, 217-218 (Clay Dugas); 6 R 31-32 (Ann Harris); 5 R 97, 104-105 (David Harris). Even when trial counsel strongly advised him on several occasions to allow them to present this evidence, Harris adamantly refused. 6 R 178-179. As Dennis Powell testified, "[M]y understanding was, David didn't fault his family for what had happened and he didn't feel like he ought to drag his family into it." 6 R 180.

III. Guilt-Innocence Phase

Harris took the stand in his own behalf at the guilt-innocence phase of his trial. He admitted that he broke into Mays' apartment, but he claimed that he only intended to burglarize it.[4] He testified that he took

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[4]However, Harris could not explain on cross-examination why he failed to notice a videocassette recorder, jewelry, and other valuable items in the living room of the apartment and headed directly to the bedroom occupied by Mays and Lockard.

the gun only because he thought "it would avoid anybody from getting hurt." According to Harris, Mays and Lockard were awakened not by Harris' flashlight shining in their eyes, as Lockard had testified, but by the hall light when Harris opened the door to their bedroom. Harris claimed that when he saw Mays and Lockard in the bedroom, he tried to close the door, but they were already awake. Because Mays was acting "jumpy" and Harris feared he might attack him, Harris "used" Lockard to safely get out of the apartment. Harris claimed that he shot Mays only after Mays shot him first. He testified that he was scared during the exchange of gunfire with Mays and that he thought Mays was trying to kill him.

However, Harris told police shortly after his arrest that he was "looking for a piece" when he entered Mays' apartment and that Mays "acted crazy" but never threatened him. He also told police that his first shot at Mays missed, so he fired two more times, but Mays was still moving so he fired once more to "finish[] him off."

The jury was instructed at the guilt-innocence phase on the primary offense of capital murder and the lesser included offense of voluntary manslaughter, defined as "caus[ing] the death of an individual under circumstances that would constitute murder except that he caused the death under the immediate influence of sudden passion arising from an adequate cause."[5] The jury found Harris guilty of capital murder.

IV. Punishment Phase

At the punishment phase, the State presented evidence of numerous prior offenses committed by Harris, both adjudicated and unadjudicated, including burglaries, assaults, and robberies. Harris was court-martialled, dishonorably discharged from the Army, and sentenced to confinement as a result of a series of burglary and theft offenses he

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[5]Harris objected to the charge at trial and argued on direct appeal that the application paragraph on capital murder failed to require the State to disprove that he acted as a result of sudden passion arising from an adequate cause and thereby impermissibly shifted the burden of proof on this issue to him since the sudden passion "element" was submitted only in the application paragraph on voluntary manslaughter. The Texas Court of Criminal Appeals held that because Mays was acting in Lockard's defense and/or to prevent her kidnapping, Harris was not even entitled to a jury charge on voluntary manslaughter; therefore, it found it unnecessary to decide whether the charge as submitted was flawed. *Harris v. State*, 784 S.W.2d 5, 9-10 (Tex. Crim. App. 1989).

committed while stationed in Germany. He was also convicted of robbery, burglary, and two counts of attempted burglary and sentenced to six and a half years in the California Department of Corrections. He was convicted of possession of a deadly weapon by a prisoner while incarcerated in California and was sentenced to an additional two years.

The State also presented evidence concerning Harris' involvement in the 1976 murder of a Dallas police officer, for which Randall Dale Adams was convicted and sentenced to death. Harris admitted to police officers that he had bragged about being the triggerman because it enhanced his reputation as a bad, tough person. Harris was not charged in connection with the offense, and he testified at Adams' trial that Adams shot and killed the police officer.[6]

There was also evidence that Harris attempted to escape from the detention center where he was being held pending his capital murder trial. Finally, responding to a hypothetical question setting forth the facts of the capital offense and Harris' prior criminal history, Dr. Edward Gripon, a psychiatrist, opined that there was a substantial risk that Harris would engage in similar behavior in the future.

In spite of the limitations that Harris placed on trial counsel's pretrial preparation for the punishment phase, trial counsel were able to develop and present the testimony of Evelyn Powell, a counselor with the Orange County Council of Alcoholism, and Nancy Petkovsek, a parole officer, both of whom testified regarding Harris' history of alcoholism, his potential for rehabilitation, and his remorse following the instant offense.[7]

At the conclusion of the punishment phase, the jury was instructed to answer three questions:

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[6]Adams' conviction was subsequently set aside by the Texas Court of Criminal Appeals based on its determination that the State had suppressed evidence favorable to Adams, deceived the trial court, and knowingly used perjured testimony to gain his conviction. *Ex parte Adams*, 768 S.W.2d 281 (Tex. Crim. App. 1989). As the court wrote in its opinion on Harris' direct appeal, "[Harris] was only one witness who committed perjury during Adams' capital murder trial. [Harris] recanted his trial testimony during the hearing on Adams' writ of habeas corpus and attested to Adams' innocence." *Harris*, 784 S.W.2d at 15 n.11.

[7]Trial counsel also intended to present the testimony of a prison chaplain who had become acquainted with Harris since his arrest and had agreed to testify about Harris' religious conversion and repentance; however, they were forced to forego presenting that evidence in light of Harris' escape attempt, which took place while prisoners were being escorted to chapel.

> Was the conduct of the defendant that caused the death of the deceased committed deliberately and with the reasonable expectation that the death of the deceased or another would result?
>
> Is there a probability that the defendant will commit criminal acts of violence that will constitute a continuing threat to society?
>
> Was the conduct of the defendant in killing the deceased unreasonable in response to the provocation, if any, by the deceased?

The jury answered all three questions affirmatively, and Harris was sentenced to death pursuant to Texas law. *See* TEX. CODE CRIM. PROC. ANN. art. 37.071 (West 1985).

V. State Habeas Corpus Review

After his conviction and sentence were affirmed on direct appeal, Harris filed a state habeas application raising forty-four separate claims of constitutional error, including the four issues presented in this appeal.

Harris argued in his application that the punishment charge precluded jury consideration of his mitigating evidence, including evidence that the victim shot first. He also asserted that his trial attorneys were ineffective because they did not develop and present evidence at the punishment phase concerning his traumatic childhood, below-average intelligence and organic brain damage, the fact that he was the victim of a homosexual gang rape at age thirteen, and positive attributes of his California prison record. He attached to his application affidavits from both family and non-family witnesses averring that he suffered emotional abuse at the hands of his father, the trauma of losing his younger brother from drowning at age four, and the trauma of being blamed by his father for his brother's death. He presented school records indicating he had an I.Q. score of 88 in the seventh grade and medical records showing that he had suffered two head injuries as a teenager resulting in some "minor EEG changes which are probably of no clinical significance." Harris attached the affidavit of Yolanda

Torres[8] averring that Harris had told her that when he was twelve, other children spread an untrue rumor that he was homosexual, and that when he was thirteen, he was gang-raped by four men while hitchhiking to Port Arthur, Texas. Harris also attached laudatory citations he received in 1983 and 1984 during his incarceration in California. The trial court summarily denied Harris' application, but the Texas Court of Criminal Appeals subsequently remanded the case to the trial court for additional affidavits or, alternatively, an evidentiary hearing concerning the claims of ineffective assistance of counsel and ordered the case filed and set for submission on the challenge to the punishment jury charge.

Harris then supplemented his application with a ten-page "psychosocial assessment" prepared by forensic social worker Fran St. Peter, and a signed "declaration" from Harris, which stated in part:

> My conversations with [trial counsel] regarding the penalty phase of my trial were virtually non-existent. Counsel never indicated nor discussed with me the importance of presenting mitigating evidence at the penalty phase and did not explain to me the general types of evidence that could be submitted or, beyond a brief conversation about testimony from my family, any specific evidence that could be submitted in my case.
>
> * * *
>
> If my tiral [sic] counsel had explained to me the importance of mitigating evidence, I certainly would have instructed them to interview my family members and to elicit testimony from them. I also would have explained to them the facts concerning my background that are set forth in detail in the Habeas petition filed on my behalf . . . .

Trial counsel Dennis Powell submitted an affidavit which stated in part:

> I did extensive investigation into David's background and history. I obtained through the family boxes of information and records of David's background and history. I did interview the family members. The decision as to the mitigation evidence to be presented was made by the client, contrary to counsel's advice.
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> * * *

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[8]Torres was apparently Harris' fiancée at the time of his state habeas corpus proceedings. It is unclear when they met or when they became engaged, but there is no indication in the record that Torres was acquainted with Harris at the time of his trial or that she was available or willing to testify at his trial.

> [E]fforts were made to [present mitigating evidence from family members] but such efforts were rejected by the defendant. . . .

Trial counsel Clay Dugas submitted an affidavit which stated in part:

> The witnesses called in the punishment phase were called pursuant to discussions with the defendant. . . .
>
> * * *
>
> The mitigating evidence which was presented on behalf of David Ray Harris was presented with the consent of the defendant. My recollection is that persons whom we would have liked to call on behalf of the defendant, and many facts which we would have liked to have delved into were ruled out by the defendant. I might furthermore add that many of the factors which could possibly have been brought out pertaining to David Ray Harris' past were matters which if brought would "open the door" to many other areas of David Ray Harris' past which would in counsel's mind have prejudiced the jury even more so against the defendant. In short, the mitigating evidence which was presented was the result of trial strategy. . . .

After considering the extensive affidavit testimony, the state habeas court issued findings of fact and conclusions of law and recommended that relief be denied.[9] With regard to the claim of attorney ineffectiveness, the court made the following findings of fact:

> Trial counsel did extensive research and investigation to discover favorable mitigating evidence. All matters were fully and completely conveyed to and discussed with Petitioner. The decision as to what evidence to produce or not present at trial was made intentionally, knowingly and voluntarily by Petitioner.
>
> All matters of consequence that occurred during trial were evaluated carefully and properly by trial counsel and Petitioner, and all decisions were made solely as the result of trial strategy.

The Court of Criminal Appeals adopted these findings and denied relief on this claim.

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[9]The Honorable Larry Gist, the judge who presided over Harris' state habeas corpus proceedings, also presided over his trial.

VI. Federal Habeas Corpus Review

Harris then filed his habeas petition in federal district court raising essentially the same claims and offering the same documentary support. The district court conducted the first of two evidentiary hearings at Harris' request on July 15 and 16, 1996. Harris presented as witnesses at the evidentiary hearing his mother, Ann Harris, and a family friend, Eva Stewart, who testified at length regarding Harris' childhood and young adulthood, particularly his difficulty coping with the death of his four-year-old brother at the age of three and the disparate treatment and emotional abuse he received from his father throughout his life.

However, these witnesses also had personal knowledge about Harris' past criminal acts, in addition to those already offered by the State at the punishment phase, such as stealing his own parents' car and burglarizing neighbors' homes. 6 R 36, 71-72. Even when his parents sent him to live with his aunt, Kay Furnish, in California in hopes of breaking him from the life of crime he had fallen into in Vidor, Harris continued to cause trouble for his aunt and was eventually asked by her to leave. 6 R 38-39, 79. They further testified that Harris was raised in a supportive, financially secure, two-parent household (6 R 35); that each time Harris was incarcerated, his parents were there for him after his release, providing him with a job, a car, and a home (6 R 42-43, 75, 77); and that his friends and family essentially tried everything they could to get Harris on the right track, but their efforts only ended in frustration. 6 R 55-56, 74. Further, Harris' mother testified that, because of what she perceived as favoritism on her husband's part for Ricky, and later Mark, over David, she in fact favored David and "tried to give him the attention that his daddy wasn't giving him." 6 R 44. She also testified that Harris' father used his pension to finance Harris' legal representation at trial. 6 R 46.

Harris also presented trial attorneys Dennis Powell and Clay Dugas, who testified that they were aware of a great deal of the evidence concerning Harris' family background, 6 R 145-147, 178, but that Harris refused to allow them to develop and present it. 6 R 121, 128-131, 147-148, 178-180, 201, 205, 217-218. Harris himself testified that, at the time of trial, it was his desire "to put up a wall around [his] family life

and to shield that and those matters from coming into court[.]"[10] 5 R 104-105. Trial counsel testified that the limitations imposed by Harris necessarily limited their efforts to develop and present punishment-phase evidence. 6 R 134, 147, 217-218.

Counsel further testified that they believed there was no basis to present evidence at punishment that Harris had below-average intelligence or brain damage, had been the victim of a homosexual rape, or had a good prison record. Powell testified without contradiction that Harris' demeanor and behavior gave him no indication that Harris was mentally deficient or brain-damaged.[11] 6 R 169-170, 172. Powell and appellate counsel Doug Barlow both testified that Harris was very bright and was, in fact, more intelligent than the average criminal defendant. 6 R 169-170, 172; 5 R 36; *see also* 5 R 68-69. Harris participated actively in both the trial and appellate phases of his case. He corresponded regularly with his attorneys, frequently providing them with citations to relevant case law and cogent legal analyses of potential claims.[12] 6 R 170-171; 5 R 30-36; RX 40-62.

Counsel testified they were unaware at the time of trial of any evidence that Harris had ever been the victim of a homosexual gang rape; Harris never volunteered any such information, and counsel knew of no other way they could have discovered it. 6 R 166-167; *see also id.* at 150. Notably, Harris neither called Yolanda Torres as a witness nor proffered her affidavit for admission into evidence at the federal evidentiary hearing. *See* 5 R 47 (withdrawing affidavit of Yolanda Torres). Thus, Harris presented no evidence in federal court supporting his claim that he was raped.

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[10]Ann Harris testified that Dennis Powell told her before trial that Harris had "insist[ed]" that she not testify. 6 R 32. Both Ann and David Harris acknowledged that Harris was very protective of his family and felt bad for putting them through the embarrassment and pain of his being charged with and tried for capital murder, and that his instructions to trial counsel to keep his family out of it were consistent with Harris' propensities for shielding his family from the process. 6 R 54; 5 R 97, 104-105.

[11]The only evidence presented by Harris at the federal evidentiary hearing to support his claim of below-average intelligence and brain damage was the same evidence he had presented in his state habeas corpus proceeding: an I.Q. score of 88 in the seventh grade (PX 8) and hospital records documenting two head injuries Harris suffered as a teenager (PX 6).

[12]Further, Harris' mother testified that Harris had received his paralegal license through correspondence courses while incarcerated on death row and, in fact, assisted other inmates in preparing legal documents. 6 R 44-45, 55.

Finally, as trial counsel testified without contradiction at the evidentiary hearing, they were aware of Harris' prior prison stay and had, in fact, reviewed the California prison records, which were made available to them by the State before trial, but found nothing substantially favorable.[13] 6 R 152, 174-175, 212. Further, trial counsel received no indication from Harris that the prison records contained anything that could reflect favorably upon his character. *Id.* In fact, the only thing Harris informed trial counsel Clay Dugas of in connection with his California prison stay is that his sentence was extended when he was convicted of possession of a handmade deadly weapon while in prison. 6 R 211-212. The prison records themselves reveal that, in addition to his conviction for possession of a weapon by a prisoner offered by the State at trial, Harris was found in possession of a handmade weapon on at least three more occasions while incarcerated in California; he was eventually placed in segregated housing as a result. RX 4-6, 10-11 (admitted at 5 R 51). He was also written up for fighting, participating in a riot, and engaging in prohibited sexual contact. RX 7-8, 13-14 (admitted at 5 R 51).

At the second evidentiary hearing on August 31, 1998,[14] Harris presented the testimony of forensic social worker Fran St. Peter, who opined that Harris' emotional and psychological development were arrested prior to the sixth grade due to his traumatic childhood and polysubstance abuse at an early age.[15] 9 R 10-18. St. Peter further testified that she believed Harris suffers from alcohol dependence and alcohol idiosyncratic intoxication disorder, which results in an individual having a total change in personality when under the influence

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[13]Harris offered into evidence laudatory citations he received in 1983 and 1984 during his incarceration in a California prison for armed robbery. PX 15. However, the source of these citations is unclear as they were not included in the official prison records obtained by the State at trial or by counsel for the Director in preparation for federal proceedings. Assuming they were in Harris' possession at the time of trial, he apparently failed to alert counsel to the existence of such information. 6 R 152, 174-175, 212.

[14]After initially overruling the Director's objections to several hearsay affidavits presented by Harris in lieu of live testimony at the first evidentiary hearing, the district court sustained the Director's renewed objection in an order issued almost two years after the first hearing and invited Harris to request a second hearing at which he could present these witnesses' live testimony.

[15]Harris also presented witnesses Terrence Kirk and Jay Swango, but their testimony is not relevant to the issues presented in this appeal.

of alcohol. 9 R 18-19. She acknowledged on cross-examination, however, that the most recent version of the Diagnostic and Statistical Manual does not recognize alcohol idiosyncratic intoxication disorder as a separate diagnosis. 9 R 28.

The district court then referred the case to a magistrate judge to prepare a report and recommendation. The magistrate judge recommended that Harris' petition be conditionally granted based on his conclusion that trial counsel rendered ineffective assistance at the sentencing hearing, but that relief on Harris' other claims be denied. Harris' Appendix (hereinafter "App.") E. In so holding, the magistrate judge seized on testimony from trial counsel Dennis Powell that he was circumventing Harris' pretrial instructions when he cross-examined the State's witnesses and called two defense witnesses at the punishment phase of trial. App. E-26. Characterizing this testimony as inconsistent with Powell's affidavit testimony in state court that "[t]he decision as to the mitigation evidence to be presented was made by the client," the magistrate judge held that Harris had proved that the state court's findings were erroneous and thus had rebutted the presumption of correctness accorded under former 28 U.S.C. § 2254(d).[16] App. E-26-27. Significantly, though, the magistrate judge went on to make the inconsistent finding that "Harris did have a change of heart after being convicted, and he agreed to allow counsel to put on their case in mitigation. . . ." App. E-28. Trial counsel's misstep, according to the magistrate judge, was in failing to continue investigating and developing evidence regarding Harris' background through non-family member witnesses, despite Harris' initial instructions, in the hopes that Harris would have a change of heart.[17] App. E-3-28-29. The magistrate judge

[16]Actually, the magistrate judge erroneously applied the amended version of 28 U.S.C. § 2254(e)(1), but the district court corrected the error. *See* App. F-15.

[17]The magistrate judge determined that trial counsel performed deficiently, not only in failing to present evidence regarding Harris' family, but also in failing to investigate and present evidence regarding a homosexual gang rape, below-average intelligence, organic brain damage, and prison record. Failing to account for trial counsel's testimony setting forth the strategic reasons for not presenting this evidence – *i.e.*, that they knew of no evidence to support the allegations, that the evidence would do Harris more harm than good – the magistrate judge surmised that counsel's failure to investigate these areas was based, not on the strategic reasons identified by counsel, but on Harris' instructions to counsel not to present mitigating evidence, which according to the magistrate judge constituted deficient performance given his determination that counsel mistook the scope of Harris' instructions. *See* RE Tab 8 at 935-936.

further held that, had counsel presented evidence of Harris' family background, the homosexual gang rape, below-average intelligence, organic brain damage, and prison records, there is a reasonable probability that he would not have been sentenced to death. App. E-35; *see also* App. F-23-24.

After both parties filed written objections to the magistrate judge's report and recommendation, the district court issued a memorandum opinion adopting the magistrate's report, except as specifically noted in the opinion, and concluding in addition that Harris was also entitled to relief based on his conclusion that the punishment charge precluded jury consideration of evidence that the victim shot first. App. F-4-5. The district court acknowledged that this evidence is relevant to the third special issue, but concluded nonetheless that the special issue was an inadequate vehicle because it suffered the same defect as the "nullification instruction" recently condemned by this Court in *Penry v. Johnson*, 532 U.S. 782 (2001) (*Penry II*). Specifically, the court held that the instructions were internally contradictory and confusing to the jury because the jury could not logically answer the third punishment issue "no" as such a response would have been inconsistent with its finding at the guilt-innocence phase (in rejecting Harris' voluntary manslaughter defense) that Harris did not kill "under the immediate influence of sudden passion based upon adequate cause." App. F-5.

The United States Court of Appeals for the Fifth Circuit reversed the lower court's grant of relief on these two claims and affirmed its judgment on three additional claims cross-appealed by Harris.

ARGUMENT

I. The Questions Presented For Review Are Unworthy Of The Court's Attention.

The Rules of the Supreme Court provide that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." SUP. CT. R. 10. In the instant case, Harris fails to advance a "compelling reason" for this Court to review his case, and none exists.

II. Harris Was Not Deprived of Constitutionally Effective Assistance of Counsel at the Punishment Phase of His Trial.

In Harris' first question presented for review, he complains that his trial attorneys rendered ineffective assistance at the punishment phase when they failed to investigate, develop and present evidence Harris claims was available. However, trial counsel's performance at the punishment phase was certainly reasonable in light of the limitations Harris placed on them.[18] But, in any event, regardless how these deficient-performance issues are resolved, the court of appeals correctly reversed the district court's judgment because Harris has failed to prove prejudice.

A. The federal district court erred in finding deficient performance.

The federal district court failed to accord proper deference to the state court findings disposing of this claim. But, in any event, the evidence presented at the federal hearings only underscores the correctness of the state court findings.

State court findings of fact are entitled to a presumption of correctness "unless they are not 'fairly support[ed]' by the record, or another of the exceptions applies, or [Harris] establishes 'by convincing evidence' that they are erroneous." *Self v. Collins*, 973 F.2d 1198, 1204 (5th Cir. 1992) (quoting former 28 U.S.C. § 2254(d)).[19] A federal habeas court must "more than simply disagree with the state court before rejecting its factual determinations." *Marshall v. Lonberger*, 459 U.S. 422, 432 (1983) (internal quotation omitted).

Apparently satisfied that the state court's findings were the result of a full and fair hearing and that none of the eight enumerated exceptions to the former statutory presumption of correctness applied, the district court held nonetheless that Harris had demonstrated by convincing evidence presented in federal court that the findings are erroneous. App.

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[18]The court of appeals assumed arguendo the validity of the district court's deficient-performance finding and resolved the claim based on the absence of prejudice. *See* App. A-8.

[19]Harris' federal petition was filed in district court on April 28, 1992, prior to the effective date of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 (1996); thus, it is governed by the pre-amendment version of the federal habeas corpus statute. *Lindh v. Murphy*, 521 U.S. 320, 335 (1997).

E-26-27, F-16; *see also* 28 U.S.C. § 2254(d) (West 1992). However, the record of the federal hearing reveals that it resulted in essentially the same, though more expansively developed, testimony as that presented through affidavit in state court. *See* Statement of Facts at 6-12, *supra*. But while the state court credited the affidavit testimony of trial counsel over that of Harris and found that "[a]ll matters were fully and completely conveyed to and discussed with [Harris]" and "[t]he decision as to what evidence to produce or not present at trial was made intentionally, knowingly and voluntarily by [Harris]," the district court spurned these findings and credited Harris. App. F-20.

The district court's holding that Harris has overcome the presumption of correctness hinges on a perceived discrepancy between the affidavit testimony of Dennis Powell "that all decisions about what evidence to present and what witnesses to call at the punishment phase of the trial were made by Harris" and his testimony at the federal hearing that "they called witnesses and presented evidence at the punishment phase of the trial despite allegedly being told not to do so by Harris." App. F-15-17. However, the record as a whole shows that trial counsel did comply with Harris' wishes regarding the punishment phase, as the state court found. Powell's only concession at the federal hearing was that their presentation of Evelyn Powell and Nancy Petkovsek at the punishment phase conflicted with instructions they had received from Harris *before he was found guilty of capital murder*. *See* 6 R 184-185. The district court itself reconciled any discrepancy arising from this testimony in its subsequent finding that, while Harris initially instructed his attorneys not to present additional evidence at the punishment phase, he had a "change of heart" after the jury found him guilty of capital murder and agreed to allow counsel to present a case in mitigation. App. E-28.

The district court erred in holding that Harris established by convincing evidence that the state court findings are erroneous. If anything, the evidence presented in federal court lends the findings further support. The state court findings are entitled to the presumption of correctness and compel the rejection of Harris' claim of ineffective assistance of counsel at the punishment phase.

Claims of ineffective assistance of counsel are judged under the two-prong test of *Strickland v. Washington*.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel was not

> functioning as the counsel guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S. 668, 687 (1984), *quoted in Williams v. Taylor*, 529 U.S. 362, 390 (2000) (quotation marks omitted). "To establish ineffectiveness, a defendant must show that counsel's representation fell below an objective standard of reasonableness." *Williams*, 529 U.S. at 390-91 (quoting *Strickland*, 466 U.S. at 688, 694) (quotation marks omitted).

Defense counsel has a duty to make a reasonable investigation or to make reasonable decisions that make particular investigations unnecessary. *Strickland*, 466 U.S. at 691. However, a court must assess counsel's investigatory decisions in light of the defendant's own statements and actions. *Id.*

> Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. . . . [W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.

Id. Thus, the scope of an attorney's duty to investigate may be limited by a defendant's lack of cooperation. Indeed, a criminal defendant cannot block his attorneys' efforts and later claim that the resulting performance was constitutionally deficient.

The state court's finding that "[t]he decision as to what evidence to produce or not present at trial was made intentionally, knowingly and voluntarily by [Harris]" therefore precludes a finding of deficient performance.

Furthermore, even if the state court findings were not entitled to deference, Harris has failed to prove that trial counsel performed deficiently at the punishment phase. In granting Harris relief on this claim, the lower court disregarded *Strickland*.

The district court held that Harris' trial attorneys rendered deficient performance because they failed to investigate, determine the existence of, and present evidence at the punishment phase regarding Harris' childhood, mental impairments, and good behavior in prison. The court

found that while Harris originally instructed counsel not to present a case in mitigation at the punishment phase, he had a change of heart after the jury found him guilty of capital murder and allowed them to present evidence at punishment. App. E-27-29. Trial counsel's error, according to the district court, was in failing to continue investigating Harris' background despite Harris' pretrial instructions to the contrary to be ready with this evidence when Harris gave them the "green light." However, this holding imposes a duty on counsel that is insupportable in light of *Strickland*.

Even in light of the district court's finding that Harris had a change of heart after the guilty verdict and would have allowed counsel to present this evidence,[20] the fact remains that until that time, Harris had refused to cooperate with or assist counsel in preparing for the punishment phase and had instructed them to focus their efforts on the guilt-innocence phase. *See* App. E-27; *see also* Statement of Facts at 2-3, 9-11, *supra*. Furthermore, counsel did not "blindly follow [Harris'] command" to focus their efforts on the guilt-innocence phase. *Mitchell v. Kemp*, 762 F.2d 886, 889 (11th Cir. 1985) (holding that counsel's failure to investigate and present mitigating evidence was not deficient performance, noting that counsel's "ability to obtain such . . . evidence at the time was inhibited by Mitchell's direction not to call his family. . . ."). Rather, counsel continued investigating Harris' background, but their efforts were stymied by Harris' refusal to cooperate. *See Strickland*, 466 U.S. at 691 (holding that counsel's investigatory decisions must be assessed in light of defendant's own statements and

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[20]Furthermore, while not critical to the Director's argument on this issue, it is the Director's position that, to the extent the lower court found that, after his apparent change of heart, Harris would have agreed to the presentation of mitigating evidence regarding his childhood and family background at punishment, this finding is clearly erroneous. The record reveals that Harris agreed to the presentation of two non-family witnesses at the punishment phase of trial on topics unrelated to his family history. There is no indication in the record, however, that Harris would have agreed to the presentation of testimony, whether from family members or non-family members, concerning his childhood and family. 6 R 31-32, 121, 128-131, 147-148, 156, 178-180; 201, 205, 217-218; 5 R 97, 104-105.

Additionally, to the extent the district court found that Harris only instructed counsel not to call family members as witnesses at trial, but did not prohibit them from presenting evidence regarding his childhood and family background from other sources, that finding is clearly erroneous. The record shows that Harris specifically instructed his attorneys not to call his family members to the stand *and* not to present evidence, from any source, regarding his childhood and family history. 6 R 31-32, 121, 128-131, 147-148, 156, 178-180; 201, 205, 217-218; 5 R 97, 104-105.

actions). Thus, even assuming the validity of the district court's findings, the court erred as a matter of law in holding that the facts as found entitled Harris to relief.

B. In any event, Harris has failed to prove that he was prejudiced by trial counsel's punishment-phase performance.

Alternatively, even assuming that Harris could prevail on the deficient-performance prong, he has failed to prove, "in light of the overall weakness of the proposed mitigating evidence," that he was prejudiced by the omission of evidence regarding his childhood, mental impairments, and good behavior in prison. *See* Harris' Appendix A-10.

Harris must affirmatively prove prejudice by demonstrating that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, *quoted in Williams v. Taylor*, 529 U.S. at 391. In the context of a claim that counsel rendered ineffective assistance at the punishment phase of a capital murder trial, the inquiry is whether there is a reasonable probability that, had the evidence been presented, it would have altered the jury's punishment verdict. *See Strickland*, 466 U.S. at 695.

As the court of appeals concluded, the district court, in holding that Harris proved prejudice, failed to take into account the serious negative aspects of the evidence Harris proposes should have been presented. *See* App. A-9. Regarding Harris' evidence of his traumatic childhood, which the court of appeals aptly characterizes as "less than compelling," App. A-9, the very people who could relate these facts also had personal knowledge of Harris' violent past; the State could have easily used these witnesses to reveal that Harris was even more dangerous than he already appeared. *See* Statement of Facts at 9, *supra*. Furthermore, the State would have had a powerful argument that, despite the fact that Harris grew up in a supportive family and had ample opportunity to lead a profitable life, he chose to lead the life of a criminal instead. Similarly, Harris' California prison records, as a whole, reveal that Harris was less than a model prisoner; had counsel tried to argue to the jury, based on some commendations that Harris received while incarcerated, that he was a "good prisoner," the State would almost certainly have rebutted that argument with the ample unfavorable information contained in the

records, which Harris' jury never heard. *Id.* at 11.

Harris' claims that he was mentally impaired and the victim of rape suffer from a lack of evidentiary support. An I.Q. score of 88 in the seventh grade,[21] even if it is assumed that the score was truly indicative of Harris' intellectual functioning, simply does not rise to the level of evidence reducing his culpability for the offense. And there is simply no evidence that Harris is brain-damaged. Indeed, in light of the overwhelming evidence in the record attesting to Harris' intelligence, including his testimony at the guilt-innocence phase of trial, a mitigation theory based on Harris' limited mental capacity would have been utterly implausible. Likewise, Harris failed to present any evidence in federal court to support his allegation that he was the victim of a homosexual gang-rape when he was thirteen years old.

The evidence Harris proposes should have been introduced at the punishment phase of his trial stands in stark contrast to the evidence omitted by trial attorneys in *Williams v. Taylor*, in which this Court held that the defendant had proved prejudice. Williams' attorneys had failed to discover evidence "that the defendant's parents were imprisoned for criminal neglect of their children, that defendant had been repeatedly beaten by his father, that while his parents were imprisoned he spent time in an abusive foster home, and that he had been returned to the custody of his abusive parents upon their release from prison," as well as evidence of borderline mental retardation and good prison record. App. A-9. *See Williams*, 529 U.S. at 395-396.

Harris' evidence of emotional abuse suffered at the hands of his father does not even approach the evidence of extreme physical abuse and neglect omitted by Williams' counsel; likewise, Harris' evidence of below-average intelligence is not comparable to evidence that Williams was "borderline mentally retarded." The only evidence even remotely similar to that cited by the Court in *Williams* is the commendations Harris received while in prison in California, but Harris' prison records contain more unfavorable information. *See* Statement of Facts at 11, *supra*.

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[21]In finding prejudice, the district court likened the omitted evidence in this case to that omitted by counsel in *Duhamel v. Collins*, 955 F.2d 962, 965-966 (5th Cir. 1992), in which the Fifth Circuit found the defendant *had failed to prove prejudice*. *See* App. E-31-32 It should be noted that, contrary to the district court's statement that "Duhamel's and Harris' IQ scores were similar," RE Tab 7 at 898, evidence existed "that Duhamel was moderately mentally retarded with an IQ of 56 [and] that he failed every grade but kindergarten." *Duhamel*, 955 F.2d at 966.

Harris' case is more closely comparable to *Burger v. Kemp*, 483 U.S. 776, 788-796 (1987), in which the Court held that trial counsel did not render ineffective assistance in choosing not to investigate and present evidence of his client's troubled family background. The cases involve similar degrees of abuse: Harris, the victim of emotional abuse in an otherwise stable home, and Burger, the victim of severe neglect and an extremely unstable environment. 483 U.S. at 789-790. In both cases, significantly, the witnesses who were available to relate the facts of the defendants' family background also had personal knowledge regarding the defendants' violent past not related through other witnesses, facts that if revealed through cross-examination, could harm their chances for a life sentence. *Id.* at 792. Burger, unlike Harris, had virtually no criminal record and no record of violent conduct. *Id.* at 790. And Burger's attorneys, unlike Harris', presented no mitigating evidence. *Id.* at 788. In light of these facts, the Court held that Burger had "made no showing that the justice of his sentence was rendered unreliable by a breakdown in the adversary process caused by deficiencies in counsel's assistance." *Id.* at 795-796. The same holds true in this case.

In light of the record as a whole – the relative weakness of Harris' proposed evidence, the aggravating aspects of the evidence, the strong evidence of guilt, the aggravating evidence presented by the State at trial, and the mitigating evidence presented by counsel at trial regarding Harris' alcoholism and remorse for the instant offense – there is no reasonable probability that the presentation of this additional evidence at the punishment phase of trial would have altered the jury's punishment verdict. The court below correctly reversed the district court's finding of prejudice, and this Court should deny certiorari review.

III. Harris' Federal Constitutional Rights Were Not Violated by Testimony Regarding His Arrest for Attempted Burglary and Subsequent Kidnapping Charge, Although He Was Ultimately Acquitted of the Kidnapping Charge.

In his second question presented, Harris asserts that it was improper for the prosecution to adduce punishment-phase evidence about the circumstances of a kidnapping charge for which Harris was ultimately acquitted. As the lower courts correctly determined, however, introduction of this evidence for purposes of proving Harris' future

dangerousness was not contrary to the collateral estoppel aspect of double jeopardy and thus did not violate due process.[22]

At the punishment phase of trial, the State presented the testimony of Deputy Sheriff Ray Rucker of San Bernadino, California, that on November 3, 1979, he responded to a call reporting that shots had been fired at an electronics store. He discovered the suspect vehicle in the parking lot of a nearby convenience store, and saw Harris standing near the front of the vehicle with another suspect, James Filaan; a third suspect, Louis Valdevia, was sitting inside the vehicle. As Harris, on Rucker's command, started backing toward another officer for a pat-down search, a loaded .38 caliber revolver fell from his waistband. Harris was arrested for carrying a concealed weapon and attempted burglary of the electronics store. Valdevia and Filaan were also arrested at that time. Rucker further testified that Harris and Valdevia were later charged with kidnapping Filaan and with attempted robbery of the convenience store. Rucker testified that he believed Filaan had been kidnapped based on his observation that Filaan was in fear and almost hysterical at the time of the arrest. Harris was subsequently convicted of robbery, burglary, and two counts of attempted burglary.

On cross examination by defense counsel, Rucker stated that, after being arrested, Filaan, who was at that time suspected in connection with another felony, told police he had been kidnapped by Harris and Valdevia and that the only reason he participated in the attempted burglary and robbery was because they forced him to. Although Rucker believed Harris had kidnapped Filaan, Harris was acquitted of the kidnapping charge.

The fact that Harris had been acquitted on the kidnapping charge did not preclude the State's evidentiary use of these facts at the punishment phase of his capital murder trial. Although due process requires the application of collateral estoppel, *Ashe v. Swenson*, 397 U.S. 436 (1970), that doctrine "does not preclude [the State] from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof." *Dowling v. United States*, 493 U.S. 342, 349

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[22]For the first time in this Court, Harris also articulates a Sixth Amendment claim based on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002).

(1990).[23] In *Dowling*, this Court rejected a comparable due process challenge involving the government's evidentiary use – for the purpose of establishing Dowling's identity as the perpetrator of the charged offense – of an extraneous offense of which he had been acquitted. *Id.* at 352-54. The Court declined to extend principles of double jeopardy and due process to exclude "relevant and probative evidence . . . simply because it relates to alleged criminal conduct for which a defendant has been acquitted." *Id.* at 348.

The rationale of *Dowling* applies with equal force here. "There are any number of possible explanations for the jury's acquittal verdict at [Harris'] first trial." *Dowling*, 493 U.S. at 352. The mere fact that the California jury, for whatever reason, determined that the prosecution had failed to prove, beyond a reasonable doubt, the elements of kidnapping does not render the challenged evidence any less relevant to the capital-sentencing determination. Evidence that Harris tried to coerce another individual to commit robbery, even if such coercion did not amount to kidnapping, is indisputably relevant to and probative of Harris' propensity for future violent conduct. Moreover, Harris' jury was informed fully about the circumstances of the kidnapping charge (including the fact that Filaan was originally considered a co-defendant and was at that time wanted in connection with another felony) and the fact that Harris was acquitted of the kidnapping charge. It was essentially up to the jury to determine whether Rucker's testimony concerning the kidnapping charge had any bearing on its answers to the punishment special issues.

Harris' belated reliance upon *Ring v. Arizona*, 536 U.S. 584 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), is unavailing. As an initial matter, because Harris' case is on collateral review, he is barred from relying upon the rules announced in *Ring* and *Apprendi* well after his conviction became final. *Teague v. Lane*, 489 U.S. 288 (1989). Furthermore, the *Teague* bar aside, *Ring* and *Apprendi* are inapposite. In *Ring*, the Court held that "[i]f a State makes an increase in a defendant's authorized punishment *contingent on* the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." 536 U.S. at 602 (citing *Apprendi*, 530 U.S.

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[23] At the punishment phase of a Texas capital murder trial, while the statutory special issues must be proved beyond a reasonable doubt, extraneous offenses offered to prove the special issues do not themselves have to be proved beyond a reasonable doubt.

at 482-83) (emphasis added). Unlike the sentencing factors at issue in *Ring*, the prior kidnapping charge was neither "essential" nor "necessary" for imposition of the death penalty in Harris' case, and thus cannot be characterized as an "element" of the sentence for Sixth Amendment purposes.[24] The lower courts correctly denied relief on this claim, and certiorari review should also be denied.

IV. The Punishment-phase Charge Permitted Jury Consideration of Evidence That the Victim Shot First.

Harris next claims that the punishment charge precluded jury consideration of evidence that Mark Mays fired his weapon first. Clearly, as the court of appeals held, the jury was permitted to consider this evidence when deliberating the third special issue submitted at punishment: "Was the conduct of the defendant in killing the deceased unreasonable in response to the provocation, if any, by the deceased?" The district court's contrary holding was based on an unwarranted extension of this Court's holding in *Penry v. Johnson*, 532 U.S. 782 (2001) (*Penry II*), and a faulty construction of the special issue, which is supported by neither Texas law nor the record in this case.

A. Harris' jurors were not directed to violate their oaths to give effect to mitigating evidence, therefore, *Penry II* is inapposite.

Harris relies on this Court's recent opinion in *Penry II* to support his claim that the third special issue did not provide an effective means for consideration of this evidence. However, that reliance is misplaced. In *Penry II*, jurors were given the same three special issues submitted in this case. 532 U.S. at 788-789. They were also given a supplemental "nullification instruction" directing jurors to answer any special issue in the negative – even if the evidence did not support a negative answer – if they believed the mitigating circumstances warranted a life sentence. *Id.* at 789-790. The Court held that the instructions failed to provide an adequate vehicle for the jury to make a reasoned moral response to Penry's evidence of mental retardation and childhood abuse:

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[24]Additionally, Harris' challenge stands in sharp contrast to the challenges raised in *Ring* and *Apprendi*: Harris challenges an evidentiary ruling, not a statutory scheme.

> Here . . . it would have been both logically and ethically impossible for a juror to follow both sets of instructions. Because Penry's mitigating evidence did not fit within the scope of the special issues, answering those issues in the manner prescribed on the verdict form necessarily meant ignoring the command of the supplemental instruction. And answering the special issues in the mode prescribed by the supplemental instruction necessarily meant ignoring the verdict form instructions. Indeed, jurors who wanted to answer one of the special issues falsely to give effect to the mitigating evidence would have had to violate their oath to render a "'true verdict.'" TEX. CRIM. PROC. ANN., art. 35.22 (Vernon 1989).
>
> The mechanism created by the supplemental instruction thus inserted "an element of capriciousness" into the sentencing decision, "making the jurors' power to avoid the death penalty dependent on their willingness" to elevate the supplemental instruction over the verdict form instructions. *Roberts v. Louisiana*, 428 U.S. 325, 335 (1976) (plurality opinion).

Id. at 799-800. The charge submitted in Harris' case does not create the same dilemma. Jurors in Harris' case were not instructed to violate their oaths to give effect to evidence that the victim shot first. They were not directed to answer a special issue falsely to arrive at a preferred sentencing decision. Rather, they were instructed, consistent with then-existing Texas law, to answer three special issues according to the evidence presented. As the court of appeals concluded, *Penry II* does not require that Harris' death sentence be vacated.

B. Neither Texas law nor the record in this case supports Harris' assertion that jurors believed they were precluded by their rejection of the voluntary manslaughter defense at the guilt-innocence phase from answering the third special issue negatively.

Furthermore, even if the Court's narrow holding in *Penry II* could be extended to apply to a case where jurors were not required to violate their oaths in order to give effect to a capital defendant's mitigating evidence, a negative answer to the third special issue is not inconsistent with the jury's rejection of the voluntary manslaughter defense at the guilt-innocence phase. Harris' construction of the third special issue has

absolutely no support in either Texas case law or the record in this case.[25]

The Texas courts' construction of the third special issue clearly defines the provocation inquiry more broadly than the guilt-innocence inquiries of self defense and voluntary manslaughter. In *Jurek v. Texas*, this Court upheld the former Texas capital sentencing scheme, stating that "the constitutionality of the Texas procedures turns on whether the enumerated questions allow consideration of particularized mitigating factors." 428 U.S. 262, 272 (1976). The *Jurek* Court discussed the second special issue in depth, but had only this to say about the first and third special issues:

> The Texas Court of Criminal Appeals has not yet construed the first and third questions. . . thus it is as yet undetermined whether or not the jury's consideration of those questions would properly include consideration of mitigating circumstances. In at least some situations the questions could, however, comprehend such an inquiry. *For example, the third question asks whether the conduct of the defendant was unreasonable in response to any provocation by the deceased. This might be construed to allow the jury to consider circumstances which, though not sufficient as a defense to the crime itself, might nevertheless have enough mitigating force to avoid the death penalty* . . . . We cannot, however, construe the statute; that power is reserved to the Texas courts.

Id. at 272 n.7 (emphasis added).

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[25]Alternatively, even if the third special issue did not provide an adequate vehicle, each of the first two special issues provided a means for the jury to consider evidence that the victim shot first. If the jury believed that, in the heat of a gun battle initiated by Mays, Harris was "panicked, scared" and that "the events happened quickly, that he did not know what he was thinking at the time, and that he did not know what to do" (1 R 11z), the jury could have answered "no" to the deliberateness inquiry of the first special issue. In fact, Harris' trial counsel made this argument to the jury at the punishment phase. 17 SR 694-698 (urging jury to answer first special issue "no" based on "moving gun battle" between Harris and Mays). Likewise, if the jury believed that Mays provoked Harris' gunfire, "it could have given effect to [the] provocation by finding that, ordinarily, absent such provocation, [Harris] would be non-violent. Such an understanding would support a negative response to the second issue on future dangerousness." *White v. Collins*, 959 F.2d 1319, 1324 (5th Cir. 1992). *See also Ex parte Harris*, 825 S.W.2d 120, 121-22 (Tex. Crim. App. 1991) (holding that second special issue provided adequate vehicle for consideration of evidence that Mays shot first).

A year later in *Brown v. State*, the Texas court rejected a defendant's claim that the provocation issue asks no more than that the jury reconsider its earlier decision that the killing was murder rather than voluntary manslaughter. 554 S.W.2d 677, 678-679 (Tex. Crim. App. 1977). And in *Evans v. State*, the court essentially adopted the dicta in *Jurek* to reverse a death sentence based on the trial court's failure to submit the third special issue to the jury in light of evidence raising an imperfect self-defense claim. 601 S.W.2d 943, 945-947 (Tex. Crim. App. 1980). The Texas court acknowledged this precedent in Harris' direct appeal when it assumed that he was entitled to submission of the third special issue despite its holding that he was not entitled to an instruction on voluntary manslaughter at the guilt-innocence phase. 784 S.W.2d at 10-11.[26]

Thus, the Texas courts have construed the third special issue to permit jury consideration of evidence of provocation that, while mitigating, would not support a claim of self defense or voluntary manslaughter at the guilt-innocence phase. It necessarily follows that, under Texas law, the findings required to support a voluntary manslaughter defense are greater than the findings required to answer the third special issue "no." Therefore, pursuant to Texas law, Harris' jury could logically reject the voluntary manslaughter defense at the guilt-innocence phase, yet nonetheless answer the third special issue "no."

Furthermore, the record in this case belies any claim that Harris' jury believed it was precluded from answering the third special issue "no" in light of its prior rejection of the voluntary manslaughter defense. Harris' trial counsel specifically informed jurors during punishment-phase argument that their guilty verdict did not foreordain an affirmative answer to the third special issue:

> If your guilty verdict in this case answered [the provocation special issue], the Court would not even have to submit a question. If guilty of Capital Murder meant Number Three should be, "Yes," there would be no question.

In light of this record, there is no reasonable likelihood that the jury

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[26] *See also Cantu v. Collins*, 967 F.2d 1006, 1013 (5th Cir. 1992) (rejecting claim of entitlement to voluntary manslaughter instruction despite claimed "inconsistency" between prosecutor's acquiescence to submission of third special issue at punishment and opposition to voluntary manslaughter instruction at guilt-innocence phase).

believed it was barred from considering evidence that Mays shot first.

V. Harris' Jury Was Not Precluded from Considering Any Constitutionally Relevant Mitigating Evidence at the Punishment Phase of Harris' Trial.

Finally, Harris argues that his jury was precluded from considering and giving mitigating effect to evidence of Harris' history of alcoholism and intoxication at the time of the offense in violation of the Eighth Amendment. *See Penry v. Lynaugh*, 492 U.S. 302 (1989). However, Harris presented no evidence at trial that he was intoxicated when he murdered Mark Mays; therefore, this evidence cannot be the basis of an Eighth Amendment claim. Furthermore, Harris' evidence of a history of alcoholism is simply not constitutionally relevant in the absence of evidence of intoxication at the time of the offense. But in any event, even assuming the evidence were constitutionally relevant, the special issues provided an adequate vehicle for jury consideration of that evidence.

A. There is no evidence that Harris was intoxicated when he murdered Mark Mays, therefore, evidence of Harris' history of alcoholism is not constitutionally relevant.

As the Texas Court of Criminal Appeals found on state habeas corpus review, "it is undisputed that [Harris] is an alcoholic, however, there is no evidence in the record that [Harris] was drinking at the time of the instant offense." *Ex parte Harris*, 825 S.W.2d 120, 122 (Tex. Crim. App. 1991). This fact finding is entitled to the presumption of correctness of former 28 U.S.C. § 2254(d) and must be deferred to on federal habeas corpus review. Harris fails to acknowledge, much less rebut, this finding.[27] In fact, in connection with a separate claim in the

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[27]In the district court, Harris cited as evidence that he was intoxicated at the time of the offense the trial testimony of Nancy Petkovsek that "during the commission of all crimes . . . [Harris] was under the influence of an intoxicating beverage." *See* 1 R 11o. However, this citation was taken out of context. Petkovsek clarified her trial testimony at the evidentiary hearing in the court below, stating that she was referring to Harris' intoxication at the time of prior offenses and not at the time of the instant offense. 5 R 57-59. The same was true of Harris' citation to the closing punishment-phase arguments in the court below. *See* 1 R 11o. When considered in context, the arguments were clearly referring to Harris' claim that he was intoxicated when he

court below, Harris appeared to concede this lack of evidence, faulting trial counsel for their failure to present it.[28] Harris' Brief at 35.

A *Penry* claim cannot be based on evidence that was not offered at trial. Although "the sentencer must be allowed to consider in mitigation 'any aspect of the defendant's character or record and any circumstances of the offense *that the defendant proffers* as a basis for a sentence less than death,'" "[n]othing in the Constitution obligates state courts to give mitigating evidence instructions when no evidence is offered to support them." *Delo v. Lashley*, 507 U.S. 272, 275-277 (1993) (quoting *Lockett v Ohio*, 438 U.S. 586, 604 (1978)) (emphasis of Court). Therefore, Harris clearly is not entitled to relief on his *Penry* claim based on his assertion, which was not made to the jury, that he was intoxicated when he murdered Mark Mays.

Moreover, Harris' evidence of alcoholism, which was presented at trial,[29] loses any constitutional relevance it might otherwise have had in light of the fact that there is no evidence Harris was intoxicated when he committed capital murder. The basic concern of *Penry* is "that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Penry*, 492 U.S. at 319. It was undisputed at trial that Harris suffered from

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committed each of the prior offenses offered by the State at the punishment phase.

[28]Harris based his claim of ineffective assistance of counsel on the testimony of Jay Swango at the evidentiary hearing in the district court that he and Harris had drunk about a case and a half of beer over the course of several hours on August 31, 1985. 9 R 48. However, Swango testified that he last saw Harris at about 6:00 or 6:30 that afternoon; the instant offense occurred at approximately 2:30 or 3:00 a.m. on September 1, 1985. 9 R 48-52. Thus, any assertion based on Swango's post-conviction testimony that Harris was intoxicated when he killed Mark Mays is merely speculative, and absent some direct evidence that Harris was intoxicated at the time of the offense, there is no evidence to support his claim. Furthermore, Harris himself took the stand on his own behalf at the guilt-innocence phase of his trial and related to the jury his version of the events, yet not once during his description of the offense did he suggest that he was intoxicated at the time.

[29]Harris presented the testimony of Evelyn Powell, a counselor at the Orange County Council on Alcoholic who treated Harris in 1985 after he was referred to her by his parole officer. Powell testified that Harris was an alcoholic. According to Powell, for five months Harris met with her weekly for an hour, attended Alcoholics Anonymous meetings, and had his alcoholism under control. Powell testified further, based on her training and years of experience, that Harris could, with the proper training, counseling, and effort, bring his alcoholism under control.

alcoholism. But the mere fact that Harris is an alcoholic does not reduce his culpability for Mays' murder. This evidence simply has no relevance, and thus has no mitigating value, to Harris' commission of capital murder. It stands to reason that the Eighth Amendment would not compel its consideration.

B. In any event, the special issues provided an adequate vehicle for consideration of Harris' evidence of alcoholism.

But even assuming the evidence were constitutionally relevant, the jury could give mitigating effect to that evidence through its answers to the special issues. This type of evidence can be given expression via the first special issue, which asks the jury to evaluate the deliberateness of the defendant's actions, as the Fifth Circuit has repeatedly held.[30]

Furthermore, the second special issue[31] provided a constitutionally adequate vehicle for jury consideration of Harris' alcoholism as that evidence was presented and argued at trial. The testimony of Nancy Petkosek and Evelyn Powell was clearly offered in an attempt to persuade the jury that Harris' prior violent history was necessarily, even if not demonstrably, attributable to his alcoholism and intoxication when he committed those offenses and that Harris had the capacity to control his alcoholism and live as a non-violent person except when drinking. Based on her training and years of experience, Powell opined that Harris could bring his alcoholism under control with proper training, counseling, and effort. Petkovsek testified that a death sentence in Harris' case was inappropriate because he still had a contribution to make. Defense counsel argued:

> Let's add some things to that [previous argument that you cannot predict future dangerousness]. The organic substance abuse, the alcohol abuse.
>
> Ladies and gentleman, two women came in on behalf of the

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[30] *See, e.g., Tucker v. Johnson*, 115 F.3d 276, 282 (5th Cir. 1997); *Lackey v. Scott*, 28 F.3d 486, 487 (5th Cir. 1994); *James v. Collins*, 987 F.2d 1116, 1121 (5th Cir. 1993); *Cordova v. Collins*, 953 F.2d 167, 170 (5th Cir. 1992); *Kelly v. Lynaugh*, 862 F.2d 1126, 1133 (5th Cir. 1988).

[31] The second special issue asked: "Is there a probability that the defendant will commit criminal acts of violence that will constitute a continuing threat to society?"

> defense, Mrs. Powell and Miss Petkovsek. Both said these offenses were committed under the influence of alcohol, and if there's violence it's caused by that violence.

As presented and argued, there is not a reasonable likelihood that the jury would have understood the evidence to be beyond its effective reach in answering the second special issue.[32] Certiorari review should be denied on this issue.

CONCLUSION

For the foregoing reasons, the Director respectfully requests that the petition for writ of certiorari be denied.

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[32] *See James v. Collins*, 987 F.2d at 1121 (noting that where defendant presented evidence concerning available alcohol treatment plans, jury could consider evidence of intoxication/alcohol abuse in answering second special issue).

REPLY

BRIEF

(3)

Supreme Court, U.S.
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No. 02-1433

IN THE
Supreme Court of the United States

DAVID RAY HARRIS,
Petitioner

vs.

JANIE COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,
Respondent

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the Fifth Circuit

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Did the Fifth Circuit properly disregard defense counsel's failure to investigate and present available mitigation evidence, even though (a) the court viewed the omitted evidence in isolation from the circumstances of the crime and from the mitigating evidence that was presented to the jury, and (b) the Fifth Circuit's decision conflicts with the results reached, on closely analogous facts, by many other circuits?

2. At a capital sentencing hearing, can the State constitutionally use, in its efforts to convince the jury to find the aggravating circumstances required as a prerequisite to the death penalty, evidence of a crime for which a prior jury had acquitted the defendant?

3. Can a death sentence be upheld, consistent with *Penry v. Lynaugh*, 492 U.S. 302 (1989), and *Penry v. Johnson*, 532 U.S. 782 (2001), when the jury was precluded from considering the full mitigating impact of undisputed evidence that the victim initiated the exchange of gun fire that resulted in his death and that the defendant did not fire any shots until after himself being wounded in the neck and shoulder?

4. Can a death sentence be upheld, consistent with *Penry v. Lynaugh*, 492 U.S. 302 (1989), when the jury was precluded from considering the full mitigating impact of undisputed evidence that the defendant suffered from severe alcoholism and drug addiction (and that all of the prior criminal activity proffered by the State at the sentencing hearing was committed under the influence of drugs or alcohol)?

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STATUTES

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

A. This case should be held pending resolution of *Wiggins* and *Banks*.

As set forth in Harris's petition for writ of certiorari, the Court granted certiorari in *Wiggins v. Corcoran*, 288 F.3d 629 (4th Cir. 2002), *cert. granted*, 123 S.Ct. 556 (2002) (No. 02-311) to address, among other things, the Fourth Circuit's application of *Strickland v. Washington*, 466 U.S. 668 (1984) in a way that makes counsel's performance virtually unchallengeable. The Fifth Circuit's approach to the question of ineffective assistance of counsel had the same effect in this case, making this Court's resolution of *Wiggins* potentially critical to the resolution of the questions in this case.

Since Harris filed his petition for writ of certiorari, this Court granted certiorari in *Banks v. Cockrell*, No. 01-40058 (5th Cir. 2002) (unpublished opinion), *cert. granted*, 123 S.Ct. 1784 (2003) (No. 02-8286) (April 21, 2003). Certiorari was granted in *Banks* to address a question that is also raised in Harris's petition.

The Court's decision to grant certiorari in *Banks*, coupled with its prior grant in *Wiggins*, strongly suggest that certiorari should be granted in this case or, at a minimum, that consideration of Harris's petition should be held pending resolution of *Banks* and *Wiggins*.

B. This Court granted certiorari in *Banks v. Cockrell* on a question identical to one raised in Harris's petition for writ of certiorari.

On April 21, 2003, this Court granted certiorari in *Banks v. Cockrell* on questions one, two and three raised in the petition. 123 S.Ct. 1784. Question number two asks: "Did

the Fifth Circuit act contrary to *Strickland v. Washington*, 466 U.S. 668 (1984), and *Williams v. Taylor*, 529 U.S. 362 (2000), where it weighed each item of mitigating evidence separately and concluded that no single category would have brought a different result at sentencing without weighing the impact of the evidence collectively?"

In his petition for writ of certiorari, David Ray Harris raised the following question: "Did the Fifth Circuit properly disregard defense counsel's failure to investigate and present available mitigation evidence, even though (a) the court viewed the omitted evidence in isolation from the circumstances of the crime and from the mitigating evidence that was presented to the jury, and (b) the Fifth Circuit's decision conflicts with the results reached, on closely analogous facts, by many other circuits?"

Thus a question raised in both petitions is the same: did the Fifth Circuit conduct an erroneous analysis of harm under *Strickland* when it failed in both *Banks* and *Harris v. Cockrell,* 313 F.3d 238 (5th Cir. 2002) to weigh the mitigating evidence in light of all of the evidence available in mitigation or aggravation? There can be little doubt that if this Court determines that the Fifth Circuit's analysis in *Banks* ran afoul of *Strickland,* its analysis in this case was likewise erroneous.

In this case, as fully set forth in the petition for certiorari, the Fifth Circuit examined the mitigating evidence raised in the habeas proceeding without considering at the same time the evidence that was offered in mitigation at trial or the facts and circumstances of Harris's crime.

The Fifth Circuit's error in both *Banks* and this case is very similar to one that this Court identified in *Williams v. Taylor*, 529 U.S. 362 (2000). In that case, the Virginia Supreme Court examined mitigation evidence offered at the

habeas hearing, but it did not examine that evidence in light of all of the available mitigating evidence. This Court found that the state court's "prejudice determination was unreasonable insofar as it failed to evaluate the totality of the available mitigation evidence -- both that adduced at trial, and the evidence adduced in the habeas proceeding in reweighing it against the evidence in aggravation." *Id.* at 397-8 (citing *Clemons v. Mississippi*, 494 U.S. 738, 751-52 (1990).

In its brief in opposition, Respondent does not address this error, even though it was fully argued in Harris's petition. Instead, Respondent conducts its own purported balancing of the relative weight of the mitigating and aggravating evidence. In its argument, however, Respondent commits the same error as the Fifth Circuit – it completely omits a discussion of the facts and circumstances of Harris's crime or any real analysis of the evidence actually offered in mitigation at trial.

A proper reweighing of *all* of the evidence in mitigation as mandated by *Williams*, against *all* of the evidence in aggravation, makes clear that counsel's error at the punishment phase was harmful and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. at 694.

In the habeas proceedings, Harris presented mitigating evidence suggesting a reasonable probability that a jury would have made a non-death determination in his case. Harris produced several affidavits of non-family members who describe the emotional abuse he suffered from his father, the effect of his closest brother's sudden death at age four, the trauma of being blamed by his father for the death, the stigma associated with childhood rumors of being gay, as

well as being homosexually gang raped when he was thirteen years old, having suffered repeated brain injuries requiring hospitalization, and serious substance and alcohol abuse since his early teens. In addition to this enumeration of the mitigation evidence presented post-conviction, there was evidence that Harris's prison record showed steady improvement and that he had received several commendations during a prior imprisonment.

At trial, Harris introduced mitigating evidence including his youth at the time of the offense, his status as a severe alcoholic, his cooperation with the police, his intoxication at the time of the crime, his intoxication during all of the prior extraneous offenses offered by the State at punishment, his genuine remorse and his sincere efforts to overcome his alcoholism and drug addiction.

In an effort to avoid conducting the necessary balancing, Respondent makes two arguments: first, that the witnesses proffered at the habeas hearing would have been subject to cross-examination, and second, that the information regarding Harris's prison behavior was mixed. In support of the first argument, Respondent points to no significant aggravating evidence that might have been elicited during cross-examination that was not already in the record.[1] Respondent's argument regarding Harris's prison record is

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[1] Respondent contends that additional aggravating evidence could have been elicited from these witnesses, to "reveal that Harris was even more dangerous than he already appeared." Specifically, Respondent refers to purported evidence of an incident in which a fifteen-year-old Harris allegedly "stole" his parents' car – hardly evidence that Harris was more "dangerous" than he appeared. Respondent also refers to evidence that Harris burglarized houses in the neighborhood, but evidence of neighborhood burglaries was presented to the jury during the punishment phase.

similarly unavailing. This Court recognized in *Williams* that all the additional evidence offered need not be favorable to the petitioner to support a finding of prejudice. *Williams*, 529 U.S. at 396. Furthermore, Respondent acknowledges that Harris's jury was informed of the most serious negative aspects of his prison record. Respondent's Brief in Opposition at 11. Thus, it was crucial that the jury be informed of the favorable aspects of Harris's stay in prison.

Given that the Respondent's general challenges to Harris's mitigating evidence are unavailing, the issue is whether the mitigating evidence would have made a difference in the jury's sentencing determination. To evaluate that issue, the relative strengths of the evidence in aggravation must be compared to the evidence in mitigation. *Williams*, 529 U.S. at 397.

As set forth above, the available evidence in mitigation of Harris's sentence was quite extensive. In contrast, the evidence in aggravation was relatively weak. Most significantly (although not even considered by the Fifth Circuit), the circumstances of Harris's offense were not particularly brutal when compared to other cases, including *Williams*. The allegations against Harris involved the abduction of a woman, but it is undisputed that Harris abandoned the abduction and did not physically harm the woman in any way, despite the possibility that she could be a witness against him. As to the killing of Mays, the evidence is again undisputed that Harris did not shoot Mays until Mays fired first and until after Harris had been seriously wounded. In contrast, Williams killed an unarmed, defenseless, intoxicated man, leaving him "grasping for breath." *Williams*, 529 U.S. at 368.

Harris's prior criminal record is much less extensive than that of Williams. In *Williams*, the prosecution

introduced written confessions, including one in which he confessed to attacking an elderly woman leaving her in a vegetative state from which she was not expected to recover. The evidence in mitigation was quite similar to Harris's case, except that the parental abuse was somewhat more acute in Williams's case.

This Court in *Williams* conducted a balancing of all of the evidence in mitigation against that in aggravation and found that counsel's failure to introduce the mitigating evidence prejudiced Williams within the meaning of *Strickland*. In this case, by contrast, the Fifth Circuit did not conduct the required balancing. As it did in *Banks*, the Fifth Circuit in this case simply reviewed some of the mitigating evidence without looking at the record as a whole to determine whether counsel's errors were prejudicial.

Had the Fifth Circuit conducted the required balancing, it would have been forced to conclude that Harris was prejudiced by his counsel's errors. A comparison of the evidence in this case to the evidence in *Williams* makes clear that counsel's failure to introduce significant available evidence in mitigation of Harris's sentence deprived Harris of "a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687.

C. Respondent ignores trial counsel's crucial error of relying solely on a strategy that was unsupported by the law.

Respondent takes issue with the district court's finding that Harris's trial counsel's performance was deficient.[2]

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[2] The Fifth Circuit assumed that the finding of deficient performance was valid and based its holding on a determination that counsel's deficient performance had not prejudiced Harris. *Harris*, 313 F.3d at 243.

Respondent challenges the finding on both procedural and substantive grounds. First, Respondent contends that the district court erred in finding that Harris had overcome the presumption of correctness enjoyed by the state-court fact finding that counsel's performance was reasonable. Second, Respondent argues that Harris's counsel's performance was not deficient because "'the decision as to what evidence to produce or not present at trial was made intentionally, knowingly and voluntarily by [Harris]'" Respondent's Brief in Opposition at 16 (quoting state habeas court's fact findings). In her arguments, Respondent ignores counsel's critical mistake: relying solely on a defense strategy that was legally unavailable.

A presumption of correctness applies to any background factual findings by the state court. *See Perillo v. Johnson*, 79 F.3d 441, 446 (5th Cir. 1996). But, that presumption is overcome when the fact findings are "not fairly supported by the record," 28 U.S.C. § 2254(d)(8) (later amended by 28 U.S.C. § 2254(d) (Supp. 1997) ("AEDPA"))[3], or when the petitioner establishes by "convincing evidence" that they are erroneous. *Self v. Collins*, 973 F.2d 1198, 1204 (5th Cir. 1992). The fact findings at issue here are not fairly supported by the record, and Harris established by convincing evidence that they were error.

Contrary to Respondent's arguments, the presumption does not protect the state habeas court's determinations that "[a]ll matters were fully and completely conveyed to and discussed with [Harris]" or that "the decision as to what evidence to produce or not present at trial was made intentionally, knowingly and voluntarily by [Harris]." The

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[3] The State and Harris agree that the prior version of 28 U.S.C. § 2254(d) applies in this case. *See Lindh v. Murphy*, 521 U.S. 320, 336 (1997).

record does not fairly support either of these conclusions, and Harris presented convincing evidence at the evidentiary hearing demonstrating that they were error.

Harris's counsel attempted to explain their failure to present evidence in mitigation by contending that Harris had instructed them to focus solely on defending at the guilt-innocence phase of the trial and to present no evidence at the punishment phase. The sole defensive strategy at the guilt-innocence phase was to convince the jury that because Harris fired at Mays only after Harris himself had been wounded Harris was guilty of the lesser-included offense of voluntary manslaughter and not of murder. On direct appeal, however, the Texas Court of Criminal Appeals held that Harris was not even entitled to an instruction regarding voluntary manslaughter. *Harris v. State*, 784 S.W.2d 5, 10 (Tex. Crim. App. 1989).

In other words, according to the highest criminal court in Texas, Harris's purported "strategy" for the trial – to focus on the guilt-innocence phase and get a voluntary manslaughter verdict – was foreclosed as a matter of law. Effective trial counsel should have realized and informed Harris that Harris's purported strategy to focus on the guilt-innocence phase was not likely to succeed. But, counsel never informed Harris that his guilt-innocence "strategy" was legally defective.

Thus, the state court's fact finding that Harris's "decision" regarding the punishment phase was informed is not fairly supported by the record. Had Harris's counsel informed him of the significant risk that his ***only*** guilt-innocence defense was legally foreclosed, his view of the appropriate strategy for the punishment phase would likely have been very different. Even assuming that blind deference to the client's alleged directive to forego

development of mitigating evidence could ever constitute effective assistance, it surely cannot when counsel has either failed to realize, or failed to inform the client, that the client's only defensive theory at the guilt-innocence phase may be unavailable as a matter of law.

The state habeas court's conclusion that Harris himself was responsible for counsel's decision to forego virtually all available mitigating evidence is also unsupported by the record and overcome by convincing evidence. As the district court properly found, Harris's counsel did not even comply with Harris's alleged directives. In fact, Harris's counsel conceded in his testimony that he "circumvented" Harris's instructions when he put on witnesses during the punishment phase of the trial:

Q: So, when there were matters that you thought were sufficiently important with respect to the punishment phase, you felt free to violate your client's instructions?

A: I felt like there were things I could do without any help from David and I tried to do those. Yes, I was circumventing what he told us.

6 R 185. Accordingly, Harris's counsel's decision to forego investigation and presentation of a full case in mitigation was not based on Harris's purported instructions.

Furthermore, the district court properly found that Harris's counsel's performance relative to the punishment phase of his trial was deficient. Even assuming that Harris instructed his counsel to present no evidence in mitigation, such an instruction does not by itself protect counsel's performance from scrutiny. Any decision to forgo presentation of mitigating evidence must be both informed and strategic, since mitigating evidence rises to a constitutionally important level in determining whether the

death penalty is appropriate under an individualized sentencing determination. *Woodson v. North Carolina*, 428 U.S. 280 (1976). A number of circuits have recognized that a defendant's instructions do not necessarily relieve counsel of the duty to investigate and present mitigating evidence. *See Karis v. Calderon*, 283 F.3d 1117, 1136 (9th Cir. 2002); *Silva v. Woodford*, 279 F.3d 825, 838 (9th Cir. 2002); *Coleman v. Mitchell*, 268 F.3d 417, 447-48 (6th Cir. 2001); *Battenfield v. Gibson*, 236 F.3d 1215, 1233 (10th Cir. 2001).

Additionally, Harris's counsel was deficient in failing sufficiently to inform him regarding the necessity of mitigating evidence and the potential impact of failing to present such evidence before acceding to his alleged demand that no mitigating evidence be presented. Harris was neither informed of trial counsel's decision nor of the crucial importance such a choice portended for sentencing. "Strategic choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgments support the limitations on investigation." *Moore v. Johnson*, 194 F.3d 586, 592 (5th Cir. 1999). Harris explained that, if anything, the decision not to present a case in mitigation was not properly weighed by him, since counsel did not explain its significance.[4] Harris also reiterated that "conversations regarding the penalty phase of the trial were virtually nonexistent." 5 R 94.

Stripped of its cloak of so-called "strategy," the performance of Harris's counsel at the punishment phase

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[4] Harris testified at the evidentiary hearing as follows: "And counsel never told me, 'Well, we have this,' or "Your brother can say this,' or 'Your aunt can say this.' He never told me anything like that." 5 R 98. Harris also testified that "[counsel] never got into any specifics of why he thought [Harris's mother] should take the stand or anything else." *See id.*

amounted to abandonment of their client. Harris's attorneys wholly failed to investigate Harris's childhood and background and failed to provide any compelling evidence to the jury that Harris should not be put to death. They failed to undertake this very important aspect of Harris's defense, despite that even a minimal effort would have revealed ample mitigating evidence and despite that there was much Harris's counsel did not know about Harris's background. 6 R 177.

D. The third special issue conflicts with the jury's failure to find voluntary manslaughter.

Respondent argues that the third special issue asks a different question from that asked by the voluntary manslaughter charge. She relies on the construction given by Texas courts to the third special issue that she claims permits "jury consideration of evidence of provocation that, while mitigating, would not support a claim of self defense or voluntary manslaughter at the guilt-innocence phase." Respondent's Brief on the Merits at 26. Respondent's argument does not address the problem, however. Regardless of the way Texas courts have construed the third special issue, the ***jury*** receives no information on that construction. In fact, Texas's highest criminal court has recognized that a "literal" reading of the third special issue would make it applicable only to those situations in which the offense is voluntary manslaughter and not capital murder. *Evans v. State*, 601 S.W.2d 943, 946 (Tex. Crim. App. 1980).

The jury is given no reason not to read the third special issue "literally." The third special issue is asked without additional instruction. The jury cannot possibly be presumed to understand that there is a difference between the manslaughter submission and the third special issue. The

jury is certainly not informed that evidence sufficient to support a "no" answer to special issue number three need not be sufficient to support a "yes" answer to voluntary manslaughter.

Respondent contends that any jury confusion on this topic was ameliorated by defense counsel's argument that a guilty verdict did not require a "yes" answer to question number three. There are at least two problems with this contention. First, defense counsel's argument, which Respondent quotes in her brief, is not sufficiently specific to address the problem. While counsel did argue that the guilty verdict did not answer the third special issue, he did not explain that the evidentiary standard for the two questions is different. He did not provide the jury with any way to reconcile a "no" answer to the third special issue with their rejection of the voluntary manslaughter question.

Second, the prosecution's closing argument implied that the jury had already decided the third special issue:

> They [defense counsel] still want to say, "Let's narrow it down. Please, please, please, don't hold David Harris accountable for anything, except shooting back. The gunbattle was over, with this shot in Mark Mays' arm. You knew that when you disregarded the Voluntary Manslaughter Charge, last Thursday.

This argument plainly suggests that the jury need not consider the third special issue because it had already decided the question. The prosecution's argument made explicit the flaw in the third special issue.

The third special issue did not provide the jury with an avenue through which to give effect to the mitigating impact of the evidence that Mays shot Harris first. To credit

Respondent's argument concerning Texas case law would require a determination that the jury did not in fact follow the instructions. A reviewing court is not permitted to rely on such a determination. *Penry v. Johnson*, 532 U.S. 782, 799 (2001).

CONCLUSION

For the foregoing reasons and for the reasons set forth in the petition for writ of *certiorari*, Petitioner David Ray Harris respectfully requests that the Court grant the petition. Alternatively, Harris requests that the Court stay consideration of this petition pending resolution of *Wiggins v. Corcoran*, 288 F.3d 629 (4th Cir. 2002), *cert. granted*, 123 S.Ct. 556 (2002) (No. 02-311) and *Banks v. Cockrell*, No. 01-40058 (5th Cir. 2002) (unpublished opinion), *cert. granted*, 123 S. Ct. 1784 (2003) (No. 02-8286) (April 21, 2003).

Respectfully submitted

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